TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1922

No. [redacted] 80

DUESENBERG MOTORS CORPORATION, APPELLANT,

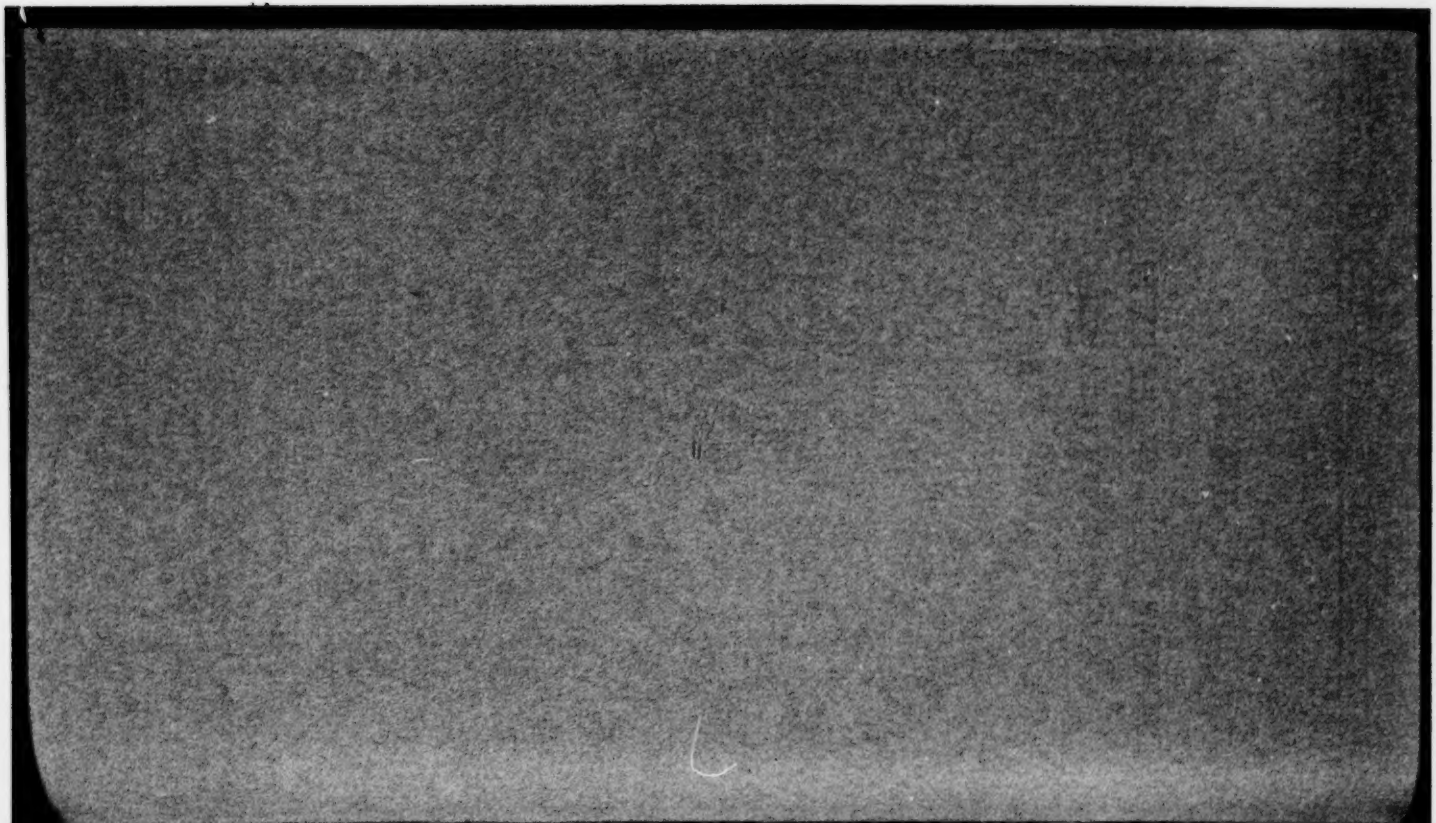
vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED MAY 9, 1931.

(28,263)



(28,263)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 318.

DUESENBERG MOTORS CORPORATION, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 23, 1922.

1 In the Court of Claims.

No. 34655.

DUESENBERG MOTORS CORPORATION

vs.

THE UNIED STATES.

I. *Petition.*

Filed July 6, 1920.

To the Honorable the Court of Claims:

The claimant, Duesenberg Motors Corporation, respectfully represents:

I.

The claimant is a corporation organized and existing under the laws of the State of New York and having an office at No. 11 Pine Street, in the City of New York, and having at all times before, during and since the period covered by this claim a factory and plant at Elizabeth, New Jersey.

II.

On or about the 20th day of November, in the year 1917, the United States then being at war with Germany, an order was given to the claimant to furnish for the use of the United States Government five hundred (500) United States standard twelve-cylinder engines, sometimes referred to as Liberty Engines; and thereupon claimant entered into a contract with the United States represented by Major A. C. Downey, Signal Corps, United States Army, for the production of said five hundred (500) standardized twelve-
2 cylinder Liberty aircraft engines or motors and their spare parts. A copy of said contract, having annexed to it as a part thereof, the order first herein mentioned, is hereto annexed, marked "Exhibit A" and made a part of this petition. It was stated in said contract that said engines or motors were to be "in accordance with the drawings and specifications attached hereto," but no such drawings or specifications were annexed to said contract.

III.

At the time of the giving of said order and of entering into said contract the claimant was, and for some time prior thereto had been, engaged in the production of internal combustion engines, including automobile and marine motors, and had large commercial con-

tracts. The giving of the order and the making of the contract hereinbefore recited made it necessary for the claimant to discontinue all of said contracts, and the officers of the Government required the claimant to do so. Said discontinuance of said commercial contracts resulted in great loss to the claimant. The claimant had at that time an unabsorbed investment of two hundred thirty-eight thousand, two hundred sixty-one and twenty-six hundredths dollars ($238,261.26) in said commercial contracts, which amount the claimant would have received back therefrom, together with profits thereon, but which, owing to the discontinuance of said commercial contracts, became and was a total loss.

IV.

The drawings and specifications referred to in the contract (Exhibit A) as being attached thereto (but which were not in
3 fact so attached) were furnished piece-meal from time to time but not so as to enable the claimant to enter into quantity production; and the only work which was practicable under said contract was in making extensive alterations in the plant of claimant company to adapt it to the uses of the Government for the purpose of carrying out the contract (Exhibit A), to assemble a competent engineering staff, and to make other preparations for the performance of said contract, all of which the claimant did at great expense.

V.

In and by said contract (Exhibit A) Article 3, the contractor agreed to deliver the five hundred (500) engines thereby required according to the following schedule:

1918.

February	10
March	50
April	125
May	165
June	150
Total	500

Payment was to be made of all cost, as defined in said contract, of the production of said engines and of an additional sum of nine hundred thirteen and five hundredths dollars ($913.05) as a fixed profit on each engine delivered and accepted. Payment was to be based upon an estimated cost for each of said engines of six thousand eighty-seven dollars ($6,087.00), but as an inducement to economy it was provided that if the actual cost of said engines, or any of them, should be less than the estimated cost the Government should pay the contractor, on account of such saving, twenty-five per cent (25%) of the difference.

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VI.

On the 11th day of December, 1917, the claimant entered into a supplemental agreement with the Government, a copy of which is hereto annexed, marked "Exhibit B," whereby the fixed profit was changed from nine hundred thirteen and five hundredths dollars ($913.05) to six hundred twenty-five dollars ($625.00) for each engine; and the amount of estimated cost of production was changed from six thousand eighty-seven dollars ($6087.00) to five thousand dollars ($5,000.00), and whereby it was agreed that the Government should place with the claimant company an additional order for five hundred (500) additional engines, making one thousand (1,000) engines in all.

VII.

The claimant was ready and willing to produce and furnish, and would have produced and furnished, all of the engines required by said contract (Exhibit A) and its supplemental agreement (Exhibit B) within the times thereby limited if drawings and specifications had been furnished in accordance with the terms of said contract and supplemental agreement and if the Government had not changed the character of the articles to be furnished, as hereinafter stated. Before, however, any of the engines called for by either said contract (Exhibit A) or its supplemental agreement (Exhibit B) could be produced or furnished, the officers of the United States decided to change the entire type and design of the engines to be produced and furnished by the claimant company. Accordingly, on the 24th day of December, 1917, the claimant was notified, in writing, by the officers of the United States to stop work on the engines as
5 specified in its contract as it was desired to substitute at least an equal number of engines of a different type, called the Bugatti motors. An order was thereupon given to the claimant to furnish for the use of the United States Government two thousand (2,000) of said Bugatti motors. In further pursuance of the decision and purpose of the officers of the United States a further order was given to the claimant by the officers of the United States to manufacture and produce said two thousand (2,000) Bugatti motors. Thereafter the claimant company, at the request of said officers, on the 4th day of January, 1918, entered into a further supplemental agreement with the United States, copy of which is hereto annexed, marked "Exhibit C," whereby it was provided that instead of the articles described in the original contract (Exhibit A) and the first supplemental agreement (Exhibit B) the contractor should make for the Government "two thousand (2,000) Bugatti Motors and such spare parts for said motors as the Government may order from time to time during the period of the construction of said motors, in accordance with specifications to follow." Said contract contained annexed thereto and as a part thereof the order given to the claimant company to manufacture and produce said two thousand (2,000) Bugatti motors. The amount of fixed profit which the contractor was to be entitled to receive was changed from six hundred twenty-

five dollars ($625.00) to seven hundred fifty dollars ($750.00) for each article, and the estimated cost upon which savings were to be based was changed from five thousand dollars ($5,000.00) to six thousand dollars ($6,000.00). Provision was also made for payment by the Government to the contractor of twelve and one-half per cent (12½%) of the actual cost of spare parts for said motors,
6 together with such an amount as would make the profit for spare parts bear the same proportionate relation to the actual cost of spare parts as the sum of the fixed profits and the amount allowed the contractor for savings on engines would bear to the actual cost of the engines. The articles were by said supplemental agreement (Exhibit C) to be delivered according to the following schedule:

1918.

March	10
April	50
May	150
June	400
July	500
August	500
September	390
Total	2,000

VIII.

On the 15th day of January, 1918, the claimant entered into a further supplemental agreement with the United States, copy of which is hereto attached, marked "Exhibit D," whereby the Government agreed to advance to the contractor an amount, not more than one million two hundred fifty thousand dollars ($1,250,000.00), conditioned upon the approval of the War Credits Board, which the contractor was to repay to the Government with interest at the rate of five (5) per centum per annum.

IX.

On the 11th day of February, 1918, the claimant entered into a further supplemental agreement with the United States, copy
7 of which is hereto annexed, marked "Exhibit E," making further provisions for an advance by the Government to the contractor of four hundred thousand dollars ($400,000.00) with interest at the rate of six (6) per centum per annum.

X.

On the 14th day of February, 1918, the claimant entered into a further supplemental agreement with the United States, copy of which is hereto annexed, marked "Exhibit F," which recited that the contractor had, at the request of the Government and in order to

reduce the cost of the above-mentioned Bugatti Motors and spare parts and hasten the delivery thereof, purchased, for the sum of four hundred thousand dollars ($400,000.00) of the F. I. A. T., a corporation organized and existing under the laws of the State of New York, its entire plant at Poughkeepsie, New York, and making provisions for the disposition thereof on the completion of the contract, to which supplemental agreement was annexed as Schedule A the agreement of sale made January 31, 1918, between F. I. A. T. and the claimant corporation, copy of which accompanying agreement with said F. I. A. T. is hereto annexed, marked "Exhibit G."

XI.

The statement made in the supplemental agreement of January 4, 1918, that the Bugatti Motors were to be constructed by the claimant company "in accordance with specifications to follow," together with the provisions of Article 2 of said supplemental agreement providing for delivery of complete motors beginning with the month of March, 1918, together with the absence of any provisions in said contract for any work of an experimental character, were based upon a belief on the part of the officers of the United States
8 by whom or under whose direction said supplemental agreement was made that there were in existence complete specifications of the same which needed only to be obtained from France; that said Bugatti Motor had passed its experimental stage and was ready for production; and the statements in said contract operated as a representation to the claimant company that such was the fact and that production in quantity could begin at or shortly after the entry into said supplemental agreement of January 4, 1918. When the first Bugatti engine was received in this country, shortly after the date of said supplemental agreement, it developed that extensive changes would be necessary. The claimant company was directed to proceed, meanwhile, actively, with production on the separate parts to the extent possible in view of the undeveloped character of the specifications of the engine. An expert member of the engineering force of the Signal Corps of the United States Army was put in special charge, with instructions to make, as promptly as possible, such changes as were necessary for the production of the engine. The officers and experts of the claimant company diligently co-operated with the officers and experts of the Signal Corps of the Army in charge of production under this contract; but such extensive changes were necessary that no complete specifications were furnished to the claimant by the officers of the United States at any time prior to the 25th day of September, 1918, when the entire time allowed by the schedule of production of said supplemental agreement was within a few days of expiring; whereby it became impossible for the claimant, on account of the failure of the United States to furnish the required specifications, to produce any of the articles required by the contract within the time limit of the contract.

XII.

On said 25th day of September, 1918, the design and specifications which had been up to that time in course of preparation by the officers of the United States had so far progressed that said officers gave the claimant company a production release, and ordered the claimant company to proceed with the production of Bugatti Motors as required by its contract. The claimant company immediately proceeded with the production, and by the 4th day of October, 1918, three of said Bugatti Motors were produced and officially tested to the entire satisfaction of the officers of the United States.

XIII.

By a further supplemental agreement entered into on the 26th day of September, 1918, between the claimant company and the United States, copy of which is hereto annexed, marked "Exhibit H," further provision was made in regard to the testing building then being erected on the plant of the contractor at Elizabeth, New Jersey.

XIV.

By a further supplemental agreement, dated October 23, 1918, copy of which is hereto annexed, marked "Exhibit I," a further advance payment by the Government was provided for upon which the contractor was to pay interest at the rate of six (6) per centum per annum.

XV.

While the claimant was actively proceeding with the construction of Bugatti Motors as required by its contract, active hostilities between the United States and Germany were suspended by the armistice of November 11, 1918. Thereupon, the claimant was directed to curtail production and was notified that the United States desired and would take only forty (40) of the motors contracted for. All of said motors were promptly produced, successfully passed the tests conducted under the authority of the officers of the Signal Corps of the United States Army representing the United States, and were accepted as satisfactory under the contract.

XVI.

The claimant company submitted to the Secretary of War its claim for a fair and just settlement of the liability of the United States under its contract. After consideration of said claim and negotiations between the officers of the United States and of the claimant company, a supplemental agreement of settlement was made and entered into on the 14th day of August, 1919, copy of which is hereto annexed, marked "Exhibit K." By said agreement it was provided, among other things, that the contractor "shall not furnish or deliver

and the Government shall not accept or pay for any further articles or work agreed to be delivered under the original contract." By said agreement provision was made as to the rate of allowance for depreciation and amortization, as provided in the original contract, and other provisions were made in regard to the sums due on War Credit loans, as provided by the original contract and supplemental agreements hereinbefore set forth.

XVII.

The contractor, by Article 10 of Exhibit K, being the agreement of settlement referred to, released and discharged the Government from all manner of claims, with the following exceptions:

11 1. Claim for interest for money borrowed by the contractor for the execution of the contract and used in the contract. It was provided that said claim should be submitted by the War Department to the Comptroller of the Treasury and if the Comptroller should decide in favor thereof the amount should be paid, but if he should decide adversely said claim might be submitted to any court of competent jurisdiction.

2. Claim asserted by the contractor for disbursement of certain expenditures made in connection with its commercial business by the termination of which the contractor claimed to have suffered a loss to the amount of such disbursements, the right to sue for the same being thereby reserved in any court of competent jurisdiction.

3. Claim asserted by the contractor arising out of the cancellation of the provisions for the production of Liberty Motors and substitution therefor of provisions for the production of Bugatti Motors, and delay in production thereof, asserted by the contractor to be due to the Bugatti Motors not being ready for production, as to which the contractor reserved the right to prosecute such claims in any court of competent jurisdiction.

XVIII.

Settlement was duly made in accordance with the provisions of said contract (Exhibit K) but with the reservation of the three items set forth in the last preceding paragraph. The claim of the claimant company for interest for money borrowed for the execution of the contract and used in the contract was, as required by said reservation, submitted to the Comptroller of the Treasury, whose decision was rendered on September 12, 1919, adversely to the claimant.

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XIX.

In accordance with the reservations made in said supplemental agreement of settlement (Exhibit K), the claimant now claims damages for the delay in the production of the Bugatti Motors, which delay was due to the fact that, without fault of the contractor, the specifications for the same were not furnished by the United States

as provided in the supplemental agreement of January 4, 1918. If said specifications had been promptly furnished the claimant would have produced all of said Bugatti Motors within the time specified in said supplemental agreement and would have earned the seven hundred fifty dollars ($750.00) fixed profit provided for each motor, amounting, for the two thousand motors, to one million five hundred thousand dollars ($1,500,000.00). The claimant therefore claims said amount of one million five hundred thousand dollars ($1,500,000.00), subject, however, to a credit for a fixed profit on the forty (40) motors produced and for profit on material in process of manufacture, and other items, amounting to two hundred ninety-eight thousand one hundred forty-eight and four hundredths dollars ($298,148.04), leaving due a balance of one million two hundred one thousand eight hundred fifty-one and ninety-six hundredths dollars ($1,201,851.96).

In addition thereto the claimant would have earned large profits from savings on cost of production and also on the spare parts of said motors, as provided in the contract.

XX.

The claimant, as a part of the expenses of endeavoring to perform said original contract and its supplemental agreements, expended the following sums for interest:

13	Interest on $2,150,000.00 advanced by the United States	$131,127.25
	Interest paid to the First National Bank of New York on loans obtained from that bank, said interest aggregating	21,151.69
	Aggregate total of interest paid	$152,278.93
	In addition to the interest so paid the claimant paid for revenue stamps required under the laws of the United States to be affixed to its notes for said loans the sum of	530.00
	Aggregating a total for interest and revenue stamps of	$152,808.93

which amount claimant claims.

XXI.

The claimant had, as hereinbefore set forth, an unabsorbed investment in its commercial business at the time of taking the original contract of two hundred thirty-eight thousand two hundred sixty-one and twenty-six hundredths dollars ($238,261.26), which became a total loss by reason of the taking of the original contract and supplemental agreements with the United States, as hereinbefore fully set forth, and which amount claimant claims.

XXII.

The amounts stated in the two preceding paragraphs are claimed as alternative to the amount of one million two hundred one thousand eight hundred fifty-one and ninety-six hundredths dollars ($1,201,851.96) hereinbefore claimed in paragraph XIX of this petition.

14

XXIII.

The claimant corporation in this case, and all its officers and stockholders, are citizens of the United States, and have at all times borne true allegiance to the Government of the United States and have never taken part in rebellion or insurrection against said Government. The claimant company is the sole owner of this claim, and no assignment or transfer of this claim, or any part thereof or interest therein, has been made.

XXIV.

The claimant claims one million two hundred one thousand eight hundred fifty-one and ninety-six hundredths dollars ($1,201,851.96).

KING AND KING,
Attorneys for Claimant.

STATE OF NEW YORK,
County of New York,
City of New York, ss:

Jervis R. Harbeck, being duly sworn, deposes and says: I am President of the Duesenberg Motors Corporation, the claimant in this case. I have read the foregoing petition, and the facts therein stated are true to the best of my knowledge and belief.

JERVIS R. HARBECK.

Subscribed and sworn to before me this 17th day of June, 1920.

FLORENCE F. CASEY,
Notary Public.

15

EXHIBIT "A."

Contract No. 2318.

Order No. 30087.

Signal Corps, United States Army.

Contract for Aeronautical Equipment.

These Articles of Agreement, entered into this 20th day of November, 1917, by and between Duesenberg Motors Corporation, a

corporation organized and existing under the laws of the State of New York, party of the first part, hereinafter called the "contractor," and the United States of America, hereinafter called the "Government," represented by A. C. Downey, Major, Signal Corps of the United States Army, hereinafter referred to as the "Contracting Officer," acting by the authority of the Chief Signal Officer of the United States Army, and under the direction of the Secretary of War, party of the second part, witnesseth:

Whereas, Congress having declared by joint resolution, approved April 6, 1917, that war exists between the United States of America and the Imperial German Government, constituting a national emergency, and

Whereas, the United States requires and is not able with the facilities at its disposal to furnish a sufficient quantity of aeronautical equipment for its purposes,

Now, therefore, under the provisions of Section 120 of an Act of Congress relating to national defense, approved June 3, 1916, and pursuant to all other laws of the United States and executive orders of the President of the United States, or heads of its departments, under which requirements for advertisement for proposals are dispensed with and contracts in the form hereof duly authorized, the President hereby places the following order with the Contractor with the requirement that it comply with the contract hereinafter set forth, and in consideration of the mutual agreements herein contained, said parties have agreed and by these presents do agree to and with each other as follows, viz.:

16 Articles Contracted For.

Article 1. The contractor shall make for the Government the following articles hereinafter called "the articles," namely: Five Hundred (500) U. S. A. Standardized 12 cylinder aircraft engines, and such spare parts as the Government shall order from time to time prior to February 1, 1918 in accordance with the drawings and specifications attached hereto, and further identified in the order hereto attached, including all authorized changes thereof, and to deliver the same f. o. b. the contractor's works, packed for shipment in the manner covered by the specifications, and, as nearly as possible under existing circumstances, at the times and in the quantities hereinafter set forth or as set forth in the order hereto attached, and the Government shall accept the articles and pay therefor, all upon the terms and conditions in this contract set forth.

General Provisions.

Article II. Time being of the essence of this contract, the contractor agrees to provide with the utmost dispatch, at the best prices obtainable:

(1) Such administrative, purchasing, manufacturing and accounting organization,

(2) Such plant, machinery and tools, and other facilities, including such facilities in addition to the contractor's normal facilities (hereinafter called "increased facilities") and

(3) Such labor, material, supplies and the like as may be necessary to enable the articles to be made, and all the requirements of this contract, including the requirements in respect to the storage and delivery of the articles contemplated herein to be complied with in manner satisfactory to the contracting officer.

The contractor in dealing with parties other than the Government, shall make all sub-contracts, purchases, payments and other arrangements for the performing of this contract, in its own name
17 and for its own account, and shall not bind or purport to bind the Government.

The contractor shall, unless otherwise directed by the Contracting Officer, insert in every contract made for increased facilities, materials, supplies and the like, relating to the performance of this contract, a provision that such contract may be assigned by the contractor to the Government or its nominee, and that such contract relates to a main contract between the contractor and the Government.

All property paid for by the Government, unless hereinafter otherwise provided, shall upon such payment become the property of the Government, and shall be properly identified as property of the Government, and shall be so marked as the Contracting Office may, from time to time, direct.

The contractor hereby waives and releases all lien or right of lien now existing or which may hereafter arise for work or labor performed or materials furnished, or for any other reason or cause under this contract, under any lien laws, State or Federal, upon the articles or any component parts, material, supplies, or other property coming into its possession which it is contemplated shall presently or ultimately become the property of the Government.

The Government may, at its option, from time to time, furnish the contractor with any increased facilities, or raw materials or parts relating to the performance of this contract, provided, however, that the contractor's undertakings for like facilities or raw materials or parts made in good faith, are not thereby interfered with, or the cost thereof increased.

In case the contractor shall desire the Government to furnish it additional plant, machinery or facilities, the same shall be made the subject of a separate agreement.

Deliveries.

Article III. The contractor agrees to deliver the articles according to the following schedule:

18	1918.
February	10
March	50
April	125
May	165
June	150
	500

Deliveries of spare parts shall be made as nearly as may be at the same time as the engines to which they apply, and as ordered by the Government.

In view of the present uncertain factors inherent in the articles, and in the establishment of the industry of producing them, it is understood that this schedule may require revision, but inasmuch as speed of production is vital to the best interests of the Government and the People of the United States, the Contractor agrees that it will, if possible, and if requested to do so by the Contracting Officer, anticipate the foregoing schedule, and agrees to give the performance of this contract precedence over all other work for parties other than the Government.

The Contractor shall not be responsible for delays, caused by strikes, fires, casualties, acts of God or the public enemy, riots, incendiarism, or any act of the Government or other cause beyond the control or without the fault of the contractor, this provision, however, not relieving the contractor from using his best efforts to remove such cause and continuing performance with the utmost dispatch whenever such cause is removed.

The contractor, from time to time, will, and at any time upon request of the Contracting Officer, shall furnish to the Contracting Officer, statements and reports upon the progress of the work and any and all factors relating to the delivery of the articles.

Delivery of the articles, and parts suitably packed, boxed, and marked as required by the Contracting Officer, shall be made to the Contracting Officer, f. o. b. at the plant of the contractor at
19 Elizabeth, N. J., but the contractor, at the cost and risk of the Government, shall store the articles and parts for so long a period, not exceeding six months, as the Contracting Officer shall request, providing such space and buildings as may be practicable for adequate and safe storage, and in determining such cost, the rental for the use of the land and buildings of the contractor, shall be determined as hereinafter, in Article XI, provided, and also at the cost of the Government, the contractor shall ship the articles and parts to any point in the United States, making all arrangements for transportation, all according to the instructions of the Contracting Officer.

If the contractor is requested to store the articles, such storage must not delay acceptance of and payment for the article.

Price.

Article IV. The price to be paid to the contractor for the articles herein contracted for shall be the sum of the following items:

(1) The actual cost of production as in Article V hereof defined and in Article VII hereof determined.

(2) The sum of Nine Hundred and Thirteen 05/100 Dollars ($913.05) as fixed profit on each article delivered and accepted.

(3) An amount for saving effected determined according to the provisions of Section (7) of Article VI hereof, provided that in case of the termination of this contract under the provisions of Article XI this item shall be the amount therein provided on all articles to which it shall apply.

The price of spare parts shall be:

(1) The Actual Cost of production as in Article V hereof defined, and in Article VII hereof determined.

(2) A profit equal to fifteen per cent (15%) of said actual cost.

(3) An additional amount, if any, determined according to provisions of Section (7a) of Article VI hereof.

20 Article V. The actual cost of production of the articles and parts hereby contracted for, hereinafter sometimes called "Actual Cost," shall be determined as set forth in Article VII, and is hereby defined as consisting of and including the following elements:

(1) The cost of all direct labor definitely ascertainable as used in the production of the articles and parts herein contracted for.

(2) The cost of all direct materials and supplies definitely ascertainable as entering into or expended in the production of the articles and parts herein contracted for.

(3) A fair amount to cover the depreciation accruing during the period of production of the articles under this contract on that portion of the plant, equipment and facilities owned by the contractor and used in or necessarily rendered idle on account of the production of the articles and parts herein contracted for and properly chargeable thereto.

(4) A fair proportion of overhead expenses other than that included in item (3). If the method of distributing overhead expenses now and heretofore in use by the contractor shall be found to be fairly accurate, it shall be followed by the contracting or accounting officer in distributing overhead hereunder. By the term "overhead expenses" is meant the indirect labor and material and other manu-

facturing expenses, and the general and administrative expenses applicable to and necessary in connection with the production of the articles and parts contracted for herein, provided that nothing herein shall be deemed to include interest, rent, advertising, collection expense, credit losses, discounts, and such taxes as income and excess profit taxes imposed by the Government of the United States.

The specific definition of the terms used in the foregoing paragraphs (1) to (4), and the determination provided for in Article VII, shall be in general accordance with the provisions of the "Memorandum on Definition of Actual Cost and on Method of Collating Cost Data."

21 Hereunto attached is Schedule A, which is hereby made a part of this agreement as fully as if the same were incorporated in the body hereof. Elements of cost, not included in the foregoing paragraphs, but provided for in the said Schedule A, shall be included in actual cost, and shall be subject to the provisions of Schedule A.

Payments.

Article VI. The Government will pay the following items within ten days of their determination, unless otherwise herein provided, as follows:

(1) For all direct materials, supplies and equipment accessories, purchased by the contractor and necessary for the purpose of this contract, and which have been delivered to and accepted by the Government, (which shall be deemed to have been accepted by the Government unless rejected within five days after tender of delivery to the Accounting Office) an amount not exceeding the cost thereof, which shall be determined weekly or at any longer regular interval at the option of the Contractor. Provided that the Government shall have the right to pay such amounts direct to the vendor, provided further that to the extent that the contractor shall purchase any such materials and equipment accessories which he shall not deliver to the Government, he shall in due time be paid as in Section (2) hereof provided.

(2) The cost of all direct materials and supplies definitely ascertainable as having actually entered into or been expended in or fabricated for use in connection with the production of the articles and parts hereby contracted for, which shall be determined weekly or at any longer regular interval, at the option of the contractor; provided that the Government has not previously paid for such costs, or any portion thereof, either under the terms of this section or under other provisions of the contract.

(3) An amount equal to the payroll of the preceding week
22 for direct labor definitely ascertainable as having been used in the production of the articles and parts herein contracted for, complete and in process, and properly chargeable thereto; but,

at the option of the contractor, any regular interval longer than a week may be substituted for the weekly periods.

(4) Amounts included in the Actual Cost, for depreciation and other items of overhead, not previously paid for by the Government, which shall be determined monthly or at longer regular intervals at the option of the contractor, provided that those items of indirect labor which are ascertainable shall be paid weekly and the balance of indirect labor shall be paid monthly.

(5) All amounts included in the Actual Cost of the articles and parts herein contracted for and not previously paid for, which shall be determined upon the completion or termination of this contract.

(6) The sum of Nine Hundred and Thirteen 05/100 dollars ($913.05) for each engine delivered and accepted as a fixed profit, all of which shall be paid in each week upon engines delivered and accepted in the previous week, not previously paid for under this Section.

(6a) The sum of fifteen per cent (15%) of the actual cost of spare parts delivered and accepted hereunder in the previous week.

(7) As an inducement to economy in the production of the articles, and in consideration of any saving to the Government which the contractor may effect below the estimated cost of the articles as set forth in Article V hereof, there shall be paid to the contractor a sum for saving effected by the contractor determined as follows:

The Estimated Cost of each article upon which savings are based is Six Thousand and Eighty-seven Dollars. Such Estimated Cost is composed of and includes all elements of Actual Cost, as in Article V hereof defined, excluding, however, royalties paid by the contractor, and the cost of special tools provided by the contractor for the purposes of this contract exclusively. At the completion or termination of the contract for reasons other than the default of the contractor, the total Actual Cost of all articles, completed and
23 accepted, shall be determined; provided that in case the Government shall furnish to the contractor, in accordance with the privilege reserved to it under Article II hereof, any raw materials or parts relating to the performance of this contract, which, if furnished by the contractor, would have constituted a part of cost of production as defined in Article V, such raw material and parts shall, for the purpose of computing the amount to be paid to the contractor, under this Section (7) be charged as a part of the Actual Cost at cost to the Government of such raw material and parts, plus cost of delivery thereof at the contractor's plant; and there shall be deducted therefrom the amount of royalties therein included, and the cost of special tools provided by the contractor for the purpose of this contract exclusively. In case the Actual Cost shall be increased by reason of changes in the specifications as in Article X hereof provided, or increases in the rate of wages under any act, determination, decision or ward of any board, commission, body or authority which the contractor is required by the Government to comply with, the

total amount of increase due to either or both of these causes shall be deducted from the total Actual Cost; and the total amount of decreases in the total Actual Cost due to changes in the specifications shall be added to Actual Cost. If the amount so arrived at shall be less than the total Estimated Cost of all the articles, completed and accepted, the Government shall pay the contractor, on account of such saving, twenty-five per cent (25%) of such difference. But if the amount of the average actual cost so arrived at of all articles delivered and accepted shall, except on account of causes beyond the contractor's control, exceed by Two Thousand Dollars ($2,000) the estimated cost of each article as modified above, then the contractor shall pay to the Government fifty per cent (50%) of such excess above the sum of such estimated cost and said Two Thousand Dollars ($2,000), multiplied by the number of articles accepted and delivered hereunder, provided, however, that the contractor need
24 pay no part of such excess unless it is permitted to complete one-half of the articles contracted for.

The Accounting Officer may, from time to time, estimate the amount due on account of savings, and payable hereunder.

(7*a*) Such an amount, if any, payable upon completion of the Contract, in addition to the fifteen per cent (15%) of the actual cost of spare parts as will make the profit payable for spare parts bear the same proportionate relation to the actual cost of said spare parts as the sum of the fixed profit and the amount allowed the contractor for saving on engines bears to the actual cost of engines.

(8) In case, but only in case, the Government shall have by separate agreement undertaken to pay for the same, the cost of increased facilities as defined and determined in accordance with Articles V and VII hereof shall be paid from time to time against the delivery of any part thereof to the contractor.

(9) The amounts advanced by the contractor to cover the cost of shipping the articles, as provided in Article III hereof, shall be paid upon the proper certificate of the officer in charge of the Accounting Section of the Division of Finance of the Signal Corps, that the contractor has paid the same for and on behalf of the Government.

(10) The amounts due as rental by the Government to the contractor under Articles III, XI and XIII hereof shall be paid monthly, final payment to be made as soon as possible after the Government shall have ceased to use the property for which such rentals are payable. For the purpose of determining the amounts due hereunder the rents for property owned by the contractor shall be deemed to accrue from day to day.

(11) All other amounts due under any of the provisions of this contract, not otherwise provided for, shall be paid upon the completion or termination of this contract, provided that amounts due for storage under Articles III and XIII hereof shall be paid at least once every two months during the period when such storage costs are being incurred.

25 Expenditures made by the contractor prior to the date of this contract shall be paid if, had such expenditures been made subsequent to the date hereof, the same would have been payable hereunder.

Every determination of Actual Cost, and the other factors under this Article VI necessary to the determination of the amount due or payable under any part thereof, shall be subject to correction and adjustment at each successive computation, provided that this shall not be deemed to compel the Government to make such corrections and readjustments before the final adjustment hereunder, and a final adjustment shall be made upon the completion or termination of the contract, and any and all amounts due by either of the parties hereto to the other, shall be immediately paid, provided that if an amount shall be found due to the contractor, the same shall be paid only upon presentation of a proper voucher as hereinafter provided.

No payment shall be made except upon a voucher wherein the officer in charge of the Accounting Section of the Division of Finance of the Signal Corps of the United States Army, or his duly authorized representative, hereinafter sometimes called the "Accounting Officer," shall certify the amounts that he has determined and that the contractor is entitled to be paid the same in accordance with the provisions of this Article VI.

It shall be the duty of the contractor to submit satisfactory proof of the amounts due under any or all of the above Sections (1) to (11) to the said Accounting Officer, which shall be submitted to him a reasonable time before any of the above payments are required to be made; and until such time as the proofs have been submitted, none of the amounts referred to in this Article shall be due or payable. In case of disagreement between the contractor and the Accounting Officer as to any amounts due or payable, payment of only such portion as may be in dispute shall be withheld.

The amounts due under Sections (1), (2) and (3) hereof shall be determined as near as may be at the end of each week.

26 In the discretion of the Accounting Officer estimated figures may be used as the basis for payments made under this Article, subject to later adjustment.

The provisions of this Article VI are in all respects subject to the provisions of Articles XI and XII of this contract relating to the termination thereof.

Determination of Costs and Payments.

Article VII. The determination of the Actual Cost as in Article V hereof defined, and of all questions arising under Article VI, shall be promptly made by or under the direction of the Accounting Officer, in accordance with the terms of this contract.

The contractor may, however, at any time before making or incurring liability for any expenditure for material, plant extension, equipment, or supplies relating to the performance of this contract, exceeding the sum of Twenty-five Thousand Dollars ($25,000.00)

in any one instance, give written notice of such intended expenditure to the representative of the officer in charge of the approval Section of the Finance Department of the Equipment Division of the Signal Corps, hereinafter called the approval officer at the contractor's plant, and thereafter the said officer shall be estopped to question the propriety of the said expenditure unless he or his representative shall before the close of the tenth business day after service of notice of such intention, express in writing his disapproval thereof.

Written notice of any intended general increase by the contractor during the prosecution of this work in the rates of wages of any class of labor above the local current rate paid for similar labor shall be given by the contractor to the officer in charge of the Division of Finance of the Signal Corps. The same shall be effective unless the officer in charge of the Division of Finance shall in writing disapprove thereof within ten days of the receipt of said notice.

The decision of the Accounting Officer on questions of the determination and allowance of costs, including the items to be
27 deducted from or added to the total actual cost, as in Section (7) of Article VI provided, shall prevail, except that either upon the completion of the contract by the contractor, or its termination by the Government, or whenever claims of cost amounting in the aggregate to $5,000.00 shall have been disallowed by the said Accounting Officer, the contractor may appeal to a Board consisting of three officers of the United States Army appointed by the Secretary of War, whose decision shall be final and binding upon both parties.

Accounting Provisions.

Article VIII. The Accounting Officer, or his designee, shall have the right to provide, should he deem such action or actions necessary, a detailed classification of accounts with the definitions to be used in connection therewith, to prescribe the methods of accounting to be followed, and the methods and bases for apportioning expense, provided that the Accounting Officer shall not prescribe definitions or regulations in disagreement with Schedule A, which is hereby incorporated in this Article as a part hereof. He shall also have the right to supervise and control the methods of storekeeping, and the books and records connected therewith, including the right to examine the same.

The contractor agrees that at the commencement, and at the termination or the completion of the contract, he will make an inventory of such stores of materials and supplies as shall be used in connection with this contract, and the Accounting Officer or his designees may supervise the same and determine the methods and check the correctness thereof.

The Accounting Officer, or his designees, shall have access to the contractor's books of account and record, and to all papers and memoranda relating to matters connected with this contract, and may audit and conduct investigations into all matters relating to this contract,

provided that the information acquired in the course thereof
28 shall be deemed confidential and shall not be divulged except with the contractor's express permission therefor. He, or his designees, may make such investigations or examination, not otherwise in the contract provided for, at each of the contractor's plants, and at other points at his discretion, as may be useful or necessary in determining any questions relating thereto.

The contractor shall furnish all reasonable facilities and assistance in connection with any and all things provided for in this Article.

The contractor shall keep all such records in shape for ready reference, and preserve the same for a period of at least six (6) years after the completion of this contract.

Inspection.

Article IX. The Government shall have inspectors at each of the contractor's factories and at other points at its discretion where and during the time the articles hereby contracted for and their component parts are being manufactured and tested, for the purpose of observing the manufacture and testing thereof, and of making such tests thereof as such inspectors may deem necessary or advisable in order to determine the compliance of such articles with the requirements of this agreement. And the inspectors shall promptly give a decision concerning acceptance or rejection subject to later rejection for cause, during the course of manufacture of the articles.

The contractor agrees to afford or cause to be afforded to such inspectors the fullest opportunity of observing such articles and their component parts at all times during their manufacture, and of testing same, without unreasonable destruction of the contractor's property at any time before delivery.

All articles hereby contracted for shall be subject to factory inspection and test, and to final acceptance or rejection by an inspector of the Government, after satisfactory completion of such inspection and test; it being understood, however, that the completed article is to be tested for performance only in accordance with the specifica-
29 tion requirements, provided, however, that as to each completed article delivered to and accepted by the Government, the Government shall after such acceptance have no right to dispute its liability therefor or claim that the same was not manufactured in full compliance with the terms of this contract and the specifications attached hereto. The contracting officer shall provide an adequate number of inspectors so that production shall not be delayed.

Changes in Specifications.

Article X. No changes shall be made in the drawings or specifications attached hereto and made a part of this contract, except as provided in this Article.

Changes may be made at any time by mutual agreement between the Contracting Officer and the contractor. In case of failure to agree, a written request for such changes shall be made by the party

desiring same. The final decision thereon shall be made by the contracting officer in writing after opportunity has been given by him for a hearing to the contractor. A reasonable time for such hearing shall be set by the contracting officer, but production and acceptance shall proceed as before and shall not be interrupted thereby pending the final decision.

The total quantity of articles to be supplied under this contract shall be divided into five lots of one hundred each. Changes determined upon during production of the first lot shall be applied only to production at the beginning of the third lot. Changes determined upon during production of the second lot shall be applied to production only at the beginning of the fourth lot, and so on throughout the contract, thereby allowing at least one lot to be produced between the determination of the change and its application to production, provided, that changes which may interrupt the continuity of production need not be incorporated in "the Articles" within six weeks from the decision of the contracting officer, as provided in the second paragraph of this Article.

30 Termination Before Completion.

Article XI. In the event of the failure of the contractor to substantially comply with the terms of this contract, or in the event that in the opinion of the Chief Signal Officer of the United States Army the public interests so require, this contract may be terminated by 30 days' notice in writing to the contractor, without prejudice to any claim the Government may have against the contractor, provided, that after receipt of said notice the contractor shall not order any additional material [illegible] by permission previously obtained from the accounting officer. The cancellation shall be deemed to be effective at the expiration of said thirty days' notice, except that cancellation in the case of default of the contractor shall be immediately effective on receipt of notice. Thereupon, the contracting officer, with the approval of the Chief Signal Officer of the United States Army, may proceed to complete the making and delivery of the articles or any part thereof, as well as any additional articles or parts out of materials on hand, and may employ such agents and employees, including the contractor, its agents and employees, as the contracting officer may deem necessary or desirable; and may take possession of the plant and property of the contractor used in the performance of this contract, secure from the contractor an assignment of all contracts and agreements relating to this contract (which the contractor hereby agrees to assign, and upon failure to so assign, this agreement shall operate as such assignment), first repaying to the contractor all sums which it shall have paid thereon and relieving the contractor from further payments thereon, and may generally do and perform all acts and things necessary or advisable in order to obtain the articles which are the subject of this contract.

In the event and to the extent that the Government takes over the plant and property of the contractor for the completion of this contract, the contractor shall be paid a reasonable rental for the use

of same, as may be mutually agreed upon between the contracting officer and the contractor, or, if they fail to agree, as may be
31 fixed by the Chief Signal Officer of the United States Army, as a reasonable rental, and the manufacture of the articles by the Government shall then be conducted without cost of any sort to the contractor, the Government, however, reserving any claim which it may have against the contractor. In case the contractor is not satisfied with the rental fixed by the Chief Signal Officer the contractor may appeal from his determination to the Board provided for in Article VII hereof.

In the event of the cancellation of this contract on account of the default of the contractor, the Government shall pay to the contractor all sums due at that date but for such default, less any damage sustained by the Government.

In the event of and upon the cancellation or termination of this contract, for any reason other than the default of the contractor, the Government shall pay to the contractor all expenditures incurred in connection with the performance of this contract and not already paid to the contractor and particularly including payment for all material purchased, all costs of production, including overhead, general administrative expense, etc., as itemized or scheduled in Article V hereof.

In addition thereto the Government shall make the following payments to the contractor, namely:

(1) On each finished article accepted the sum provided as a fixed profit by Article IV, Item (2) hereof.

(2) On unfinished articles and parts thereof a sum to be determined as follows:

An inventory shall be made of all materials and of all unfinished articles or parts thereof on hand at the cost of such materials and at the cost of manufacture of such unfinished articles and parts thereof, as hereinbefore defined. The contractor shall be paid as a profit on the unfinished portion of this contract ten per cent (10%) of the amount of this inventory in lieu of the fixed profit and proportion of saving in the cost of production of such partly completed articles.

(3) The contractor shall, in event of such cancellation or termination, be relieved by the Government of all obligations in-
32 curred for the performance of this contract and not heretofore paid by the Government.

The foregoing provisions with respect to payments to be made by the Government upon the termination or cancellation of this contract, for any cause except the default of the contractor, shall also apply in the event that the continued performance by the contractor of this contract is finally prevented by acts of war, riots, incendiarism, or other causes beyond the control and without the fault of the contractor, which may be directly traceable to the United States being in a state of war, provided that the Government shall have the benefit of any insurance which the contractor may carry

upon material provided for or articles manufactured under this contract, and upon such increased facilities as the Government shall have paid for or be obligated to pay for, its pro rata share of such insurance.

In the event of the termination of this contract as aforesaid, any and all obligations of the Government to make any payments to the contractor hereunder, other than those specified in this contract, shall at once cease and determine.

Special Test of Articles.

Article XII. Without prejudice to the right of the Government to cancel this contract for any other reason, it is agreed that, in view of the fact that the articles to be furnished under this contract, and the designs therefor, are in a state of development, this contract shall be subject to the condition that a certain number of articles, as determined in the specifications, when produced by the tools provided by the contractor, shall be submitted to a test such as is provided in the specifications. If such articles fail to pass such tests successfully, then in that event the Government may cancel this contract, and in which event the contractor shall be paid as remuneration as hereinbefore provided in case of cancellation, for causes other than contractor's default.

33 Disposition of Property on Termination or Completion.

Article XIII. Upon the completion of this contract, whether by the contractor or the Government, or the termination of the contract without further performance thereof, or from time to time during the performance of this contract, the contractor agrees to make such disposition at the expense and for the account of the Government, of the increased facilities paid for by the Government, unused material, rejected articles, and generally all such other property which shall have been paid for by the Government, as the contracting officer shall, in writing, direct; such directions to be given during the performance of this contract, or within sixty (60) days after its termination or completion, provided that material or facilities for use in connection with this contract or other contracts between the parties hereto shall not be disturbed.

Any of the foregoing property may be sold to the contractor by the contracting officer, upon terms mutually agreeable. If the contractor is required to store such property, the period of such storage shall not exceed six (6) months from the completion of the contract or its cancellation, and the cost of storage and all costs incident thereto shall be, from time to time, paid to the contractor by the Government.

If land and buildings of the contractor are used for storage, the Government shall pay the contractor a reasonable rental therefor, as may be mutually agreed upon; or if agreement is impossible, as may be fixed by the Chief Signal Officer, but in no event to be more than at the rate of ten per cent (10%) per annum of the cost of

such land and buildings to the contractor, or a proportion of such cost according to the proportion of land and buildings used.

It is agreed that the foregoing measure of payment shall apply to any storage of articles in accordance with Article III hereof.

Covenant Against Incumbrances.

Article XIV. The contractor agrees not to create or suffer to be created any mortgage, lien, pledge or other encumbrance upon any of the increased facilities, materials, supplies or other property for which the Government under the terms of this contract shall reimburse the contractor, and which is in the possession of the contractor, and further agrees not to permit or suffer any attachments, mechanics' liens or other liens or encumbrances to attach to such property or the articles, and in the event that any such attachment, lien or encumbrance is created, agrees to pay or discharge the same, to the end that all property which shall have been paid for by the Government, shall be and remain the free and unencumbered property of the Government, provided that nothing in this article contained shall require the contractor to make any such payments so long as it shall in good faith contest the validity of the claim or claims therefor, and so long as the delivered of the articles is not interfered with, and provided further, that the contractor shall give bond for the claim asserted.

The contractor shall give due notice that all property which shall have been paid for by the Government, belongs to the Government.

Contract Not Assignable by Contractor.

Article XV. Neither this contract nor any interest therein shall be transferred or assigned by the contractor to any person, firm or corporation.

Officials Not to Benefit.

Article XVI. No member of or delegate to Congress, or resident commissioner, is or shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom. But this article shall not apply to this contract so far as it may be within the operation or exceptions of Section 116 of Act of Congress, approved March 4, 1919 (35 Stats. 1109).

No Prison Labor.

Article XVII. No person or persons shall be employed in the performance of this contract who are undergoing sentence or imprisonment at hard labor, which has been imposed by the courts of the several States, Territories or Municipalities having criminal jurisdiction.

Settlement of Disputes.

Article XVIII. Except as this contract shall otherwise provide, any doubts or disputes which may arise under this contract, shall be referred to a Board composed as provided in Article VII hereof for determination. If, however, the contractor shall feel aggrieved at any decision of this Board upon such reference, it shall have the right (save only as to the allowance and determination of costs as provided for in Article VII hereof) to submit the same to the Secretary of War, whose decision shall be final.

Notice.

Article XIX. Notice under this contract shall be deemed to have been sufficiently given to and received by the contractor when mailed in a sealed, post-paid wrapper and addressed to the contractor. Whenever notice shall be given to the Contracting Officer, same shall be sufficient when mailed in a sealed, post-paid wrapper, addressed to the Chief Signal Officer of the United States Army, Washington, D. C., or when personally served on the contracting officer or his representative.

Exploitation Forbidden.

Article XX. The contractor agrees to refrain from exploiting, by publicity or otherwise, its product manufactured in pursuance of this contract, or in any way publicly advertising the fact of the manufacture of said product, and to refrain from publishing, or causing or allowing to be published any photographs, drawings, written or printed matter, or other data disclosing the articles, or parts of same, or the process of manufacture, or the plans of the Government, or any information concerning the same, or which
36 shall result in such disclosure. The contractor agrees to submit . . pictures or printed matter showing, describing or in any way relating to the progress of the work to be prosecuted under this contract, which he may desire to publish, before publishing the same, to the Chief Signal Officer of the Army, who may permit such publication, and shall have the right to censor the same, and the contractor agrees that, during the term of this contract, it will not manufacture or sell any aeroplanes, aeronautical material or apparatus connected with the same for or to anyone whosoever other than the Government, without obtaining a license therefor from the Chief Signal Officer of the Army; and the contractor further agrees to strictly adhere to all requirements and regulations promulgated by the Navy Department or the War Department, with relation to the use of private aircraft.

Contracting Officer.

Article XXI. Whenever the term "Contracting Officer" is used in this contract, the same shall be construed to mean the Contracting

Officer executing this contract, his successor or successors, his duly authorized agent or agents, or anyone designated by the Chief Signal Officer from time to time to act as Contracting Officer hereunder.

In witness whereof the party of the first part has caused this contract to be executed by its proper officers thereunto duly authorized, and the United States of America has caused this contract to be executed by the undersigned Contracting Officer hereto duly authorized.

Witness:

A. C. DOWNEY,
Major, Signal Corps, United States Army.
DUESENBERG MOTORS CORPORATION,
By J. R. HARBECK,
President.

Approved December 13, 1917.
(Sgd.) GEORGE O. SQUIER,
Major General, Chief Signal Officer of the Army.

37 Witnesses:
F. D. SCHNACKE.
MARTHA G. MILLER.

Attest:
R. H. CROSBY,
Secretary.

SCHEDULE A.

Memorandum on Definition of Actual Costs and on Method of Collating Cost Data.

Definitions.

Definition of Actual Cost.

The actual cost of production of the articles hereby contracted for is hereby defined as consisting of and including the following elements:

(1) The cost of all direct labor definitely ascertainable as used in the production of the articles herein contracted for.

(2) The cost of all direct materials and supplies definitely ascertainable as entering into or expended in the production of the articles herein contracted for.

(3) A fair amount to cover the depreciation accruing during the period of production of the articles under this contract on that portion of the plant, equipment and facilities owned by the contractor and used in or necessarily rendered idle on account of the produc-

tion of the articles herein contracted for and properly chargeable thereto.

(4) A fair proportion of overhead expenses other than that included in item (3). By the term "overhead expenses" is meant the indirect labor and other manufacturing expenses, and the general and administrative expenses applicable to and necessary in connection with the production of the articles contracted for herein, provided that nothing herein shall be deemed to include interest, rent, advertising, collection expense, credit losses, discounts, and such taxes as income and excess profit taxes imposed by the Government of the United States.

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Indirect Material.

Indirect material consists of such material as factory supplies, which, while used in the process of manufacture, either do not enter into the product, or else enter in such a way as not to be chargeable conveniently to any particular article.

Indirect Labor.

Labor used in repairing, handling, trucking, sweeping, supervising, etc.; in short, labor not expended directly upon the product may be classed in the overhead as part of the indirect labor.

Freight, Cartage, and Express (Inward).

These items should be included and charged as part of the direct material costs. When such treatment is impracticable, they may be treated as part of the overhead costs.

Experimental Work.

Experimental work directly necessary in connection with this contract, not expressly provided for, may be included as part of the overhead cost.

No portion of experimental work on other products of the contractors shall be included in the Actual Cost, except relatively small residual expense which it is impracticable to allocate distinctly.

Defective Work.

It is recognized that work under this contract will be done under abnormal conditions, and, therefore, wastage, scrap and corrective labor thereon, which could not be avoided by the exercise of good faith, shall be allowed as an element of actual cost.

Taxes.

Taxes, excepting Federal taxes such as income and excess profits taxes, accruing during such time as the contract may be in
39 process may be included as part of the overhead.

Liability Insurance.

Accrued liability insurance in so far as it covers employees working on Government contracts may be included as part of the overhead. Such accruals may cover premiums payable to insurance companies, State compensation boards, or sums paid under independent insurance plans not materially exceeding in cost those of insurance companies or State compensation boards.

Packing and Packing Supplies.

These items may include boxes, lumber, nails, containers, strapping, and miscellaneous packing supplies, and also the packing labor which is incurred, and these items may be included as part of the overhead.

Repairs.

The costs of repairs allowed in current expenses are those for repairs and alterations which are made currently to provide for the ordinary and regular upkeep of the plant, the cost of which is a usual and fairly consistent annual charge. Repairs and alterations of a general nature which are necessary only at intervals of more than a year, or replacements and unusual repairs which would involve a significant increase in the overhead expense shall not be considered as expense, but shall apply against the reserve established to provide for depreciation.

Scrap and Waste.

Whenever the scrap and waste and containers on Government work have a salvage value, this value should either be deducted from the material cost or from the overhead.

Administrative Expenses.

In the majority of cases the time of the administrative force is spent in supervising the selling organization, in solving problems of production, and in looking after the finance of the business; therefore administrative expense is partly a production cost, and partly a selling cost. Only that portion of the administrative expense which is applicable to Government work may be included as part of the overhead costs.

Salaries.

Excessive salaries or other excessive compensation shall not be allowed.

Royalty.

Any royalties or payments which the contractor may be obliged to assume or pay for the use of any patent rights in connection with the production of the artides shall be included in actual cost.

Rent.

Rent proper is not chargeable to actual cost but payments for rent shall be analyzed between (*a*) repairs and depreciation, and (*b*) return on investment, including interest on investment. For the purpose of this contract, that portion of rent payments estimated to represent cost of repairs and depreciation, shall be allowed in actual cost.

Employees' Welfare.

All of the following items may be included as overhead expense:

(1) Wages *page* employees while absent on account of sickness.

(2) Expenses of operation and maintenance of plant hospitals, also medicine and supplies for first aid to the injured, expenditures for hospitals and other organizations to cover definite benefits to employees.

(3) Payments according to a definite pension plan to disabled and veteran employees or their families, and not included in liability insurance or other items mentioned herein.

41 (4) Net results of operating the contractor's restaurants.

(5) Vacation allowances to wage earners.

(6) Expenses in connection with employees' welfare, such as group insurance, conducting club rooms, rest rooms, reading rooms, and educational classes.

Discounts.

Trade discounts and discounts allowable for prompt payments shall be deducted from material costs. The contractor shall take advantage of all discounts available and when unable to do so shall promptly notify the accounting officer of his inability and reason therefor.

Miscellaneous Deductions from Actual Cost.

There may be deducted from actual cost of production miscellaneous items of revenue accruing to the contractor in connection with present contract.

Depreciation.

The rate of depreciation depends upon the following factors:

(*a*) Nature and construction of buildings and equipment, together with their condition.

(*b*) Deterioration of plant in general and of machinery in particular due to wear and tear.

(*c*) Amount spent for maintenance in the way of repairs and renewals.

(*d*) The invention of new methods or new machines which may or may not entirely replace the old ones.

(*e*) Permanency of business, and likelihood of increase or decrease in the same.

(*f*) Amounts previously written off for depreciation.

(*g*) There are many additional factors, such as peculiar and excessive uses of machines, rate of production, idleness of plant.

Jigs, etc.

42 The cost of all small tools, jigs, dies, patterns, machine tool fixtures, gauges, testing apparatus, slashes equipment, and other appliances of the same general nature, provided exclusively for the purpose of making the articles contracted for shall be included in Actual Cost.

Methods of Compiling and Ascertaining Costs.

The contractor should use the following methods in presenting his final cost figures.

Method of Ascertaining Material Cost.

The following information should be compiled to support the material costs:

(1) Summary showing the totals of the cost value of the various kinds of material used, and supported by original records, such as material reports and requisitions, bills of materials, specifications and production reports.

(2) In determining the material cost, the actual prices paid should be used; where this is not practicable, fair average prices may be used.

(3) In ascertaining the material cost, all discounts should be deducted from the purchase price.

(4) Duties, import, expense, freight, cartage and express inward may be added to the purchase price of the material for the purpose of ascertaining the material cost, or those items may be included as forming a part of the overhead expense items as heretofore mentioned.

Method of Ascertaining Direct Labor Cost.

The following information should be compiled to support the direct labor costs:

(1) Summary showing the totals of the direct labor cost and supported by original records showing the operation, time and amount of wages paid to the employees engaged upon Government work. These original records may take the form of daily, weekly, or monthly time reports or other payroll records.

(2) Wage-rate records should be prepared, dated, and any changes therein noted, with the date thereof.

43 (3) All labor costs should be represented by wages, computed as above, and actually paid to the respective employees. These wages must be in agreement with the payroll records.

Method of Ascertaining Overhead Cost.

The following information should be compiled to support the overhead costs:

(1) Final summary showing the totals of overhead by productive departments.

(2) Summaries showing the overhead in each productive department, giving the amount distributed and applicable to Government work. These summaries will include all overhead charged to the productive departments.

(3) Summaries of the detailed items composing the overhead, directly charged to each productive department where Government work is done.

(4) Summaries showing the detailed items composing the overhead directly charged to each non-productive department and the distribution of these items.

(5) Summaries showing the detailed items composing the general operating expenses and the distribution of these items.

(6) Summaries showing the detailed items included in general and other overhead expense, if any, directly applicable and chargeable to the production of the articles contracted for.

(7) The methods or bases used in the distribution of the overhead should be specified. This includes the following: (*a*) The method or basis used for applying the productive department overhead to the job, order, article, or contract; (*b*) the method or basis used for distributing the non-productive department overhead; (*c*) the method or basis used for distributing the general operating expenses.

(8) When mentioning the methods which are used, the various percentages or rates of overhead used should be specified.

44 Principles of Distribution of Overhead Expenses.

(1) If a cost system is in use and the method of distributing the overhead of departments and product is one that is based on well-defined principles, the method of distribution may be accepted by the Accounting Officer.

(2) The period of time covered by the distribution of the overhead should be in accordance with the cost period, which should not be more than five weeks. If a cost system is not in use, the distribution of costs should be made at least monthly, according to the calendar month, if possible.

(3) Standard methods of distribution of overhead are first, direct labor cost; second, direct labor hours; third, machine hours.

First. If the wages in an individual operating department are fairly uniform, it will not make any particular difference whether the overhead is distributed on labor costs or labor hours. If, however, there is high and low priced labor in an operating department, it is more accurate to use direct labor hours, especially if both Government and commercial work is being handled in that department.

Second. The method of distribution of overhead by the direct labor hours is, in the majority of cases, the most accurate method.

Third. As between direct labor distribution and machine hour distribution, the guiding principle is that wherever the work depends upon the skill of the workman, and the machine or implements that he uses are merely his tools, the direct labor or cost is the logical method to use. If, however, automatic machines are used, or in cases where one man may run two or more machines, the machine rate is the logical one to use.

Fourth. Overhead is often distributed on a fixed basis determined in advance of incurring the expense and estimated on the basis of past experience. Where this is done the estimate must be reduced to actual figures from time to time during the life of the contract; and, in any case, in the cost determination at the termination of the contract.

Signal Corps United States Army.

Contract for Aeronautical Equipment Between Duesenberg Motors Corporation and United States of America.

Proceedings of Directors of Duesenberg Motors Corporation Electing Officers and Authorizing Execution of Contract.

Order No. D 30087.

R. A.-5247.
E. P. S.

War Department,

Office of the Chief Signal Officer.

Washington.

November 30, 1917.

From: Office Chief Signal Officer.
To: Dusenberg Motors Corporation, 120 Broadway, New York, N. Y.
Subject: Order for engines and spare parts.

In accordance with contract (ESW).
I am directed by the Chief Signal Officer of the Army to place order with you for the articles listed below.
Inspection: Goods must be ready for inspection at your factory within * * * (see contract) days after receipt of order. When ready for inspection notify Chief Inspector, Airplanes & Airplane Engines, Signal Corps, at your factory.
Items accepted should be packed for domestic shipment and furnished F. O. B. factory.
Forward on Government bill of lading which will be sent
46 you by the Traffic Branch, Signal Corps, 359 Union Terminal, Washington, D. C. See instructions on reverse side.
Immediately after shipment the consignment should be listed in detail, the original copy on Form 27 (Shippers' receipt), and one carbon copy on Form 27A (shipping notice), and these lists forwarded to the Traffic Branch, Signal Corps, 359 Union Terminal, Washington, D. C., accompanied by memorandum copy of bill of lading.
Bill upon Forms 330A and 29 inclosed herewith, observing carefully the instructions on the reverse side of Form 330A.
Shipping instructions and marking: Marked "Order 30087 Aero."
Shipping instructions will be furnished you later.

Item.

1. 500 Engines, U. S. Standard 12 cylinder, at $-- each.. $....
2. Spare parts for above engines as per contract..... ....

Total ..... $....

Note.—Early shipment is urgent, therefore please arrange for inspection in ample time to avoid any delay in delivery.

The above engines to be serially numbered 36998 to 37497 inclusive, the serial number to be preceded by the letters "S. C."

A. C. DOWNEY,
Major, Signal Corps.

Contract No. 2318 will follow.
App. IASC 18 (202).
25 T. R.
Copies to ed-fu-pos-id4-tb-lex-bu-con6-sheplar-hutton-harris-eps-5.
Incls. 5.

47

EXHIBIT "B."

Certificate of authenticity with seal of Department of the Interior.

Contract No. 2318-A.

Order No. 30087.

This agreement entered into this eleventh day of December, 1917, by and between Duesenberg Motors Corporation, a corporation organized and existing under the laws of the State of New York, party of the first part, hereinafter called the "Contractor," and the United States of America, hereinafter called the "Government," represented by A. C. Downey, Major, Signal Corps of the United States Army, hereinafter referred to as the "Contracting Officer," acting by authority of the Chief Signal Officer of the United States Army, and under the direction of the Secretary of War, party of the second part, witnesseth:

That whereas, the Contractor and the Government entered into a contract for the manufacture and supply of five hundred (500) U. S. A. standardized 12-cylinder aircraft engines and spare parts, which contract is contract No. 2318, on order No. D 30087, and

Whereas, it is desired by this agreement to modify certain terms and conditions of said contract No. 2318.

Now, therefore, it is agreed as follows:

1. That the amount of fixed profits which the Contractor is entitled to receive under the terms of said contract No. 2318 shall and hereby is changed from Nine Hundred Thirteen Dollars and Five Cents ($913.05) to Six Hundred Twenty-five Dollars ($625.00) and that the Estimated cost for each of the articles delivered under said contract, upon which savings are to be based, shall and hereby is changed from Six Thousand Eighty-seven Dollars ($6,087.00) to the sum of Five Thousand Dollars ($5,000.00).

2. That in addition to the other payments to be made to the Contractor under the provisions of said contract No. 2318,
48 there shall be paid by the Government to the Contractor, upon the termination of this contract, an amount for depreciation upon the heat treating building and equipment and upon

the machine tools specially acquired for the fabrication of the engines forming the subject matter of said contract No. 2318, acquired by the Contractor for the purpose of carrying out said contract, to be determined as follows:

The cost of said heat treating building and equipment and said special machine tools to the Contractor shall be determined. Upon the termination of the contract, the value thereof to the Contractor for use in its business shall be determined by a Board consisting of three persons, one to be chosen by the Chief Signal Office of the Army, one to be chosen by the Contractor, and one to be chosen by the nominee of the Chief Signal Officer of the Army and the nominee of the Contractor. In determining this value, such appraisers shall be guided by the use, if any, which the Contractor shall have for said building and equipment and said machine tools at the termination of said contract, in the ordinary operation of its business of manufacturing internal combustion engines, and shall not include the value, if any, which the same may have to the Contractor in the manufacture of further aviation motors, provided, however, that if any further contracts are entered into between the Government and the Contractor for aviation motors, no further depreciation shall be claimed or allowed thereon in excess of the ordinary depreciation upon the value as thus determined.

3. That the Government shall pay in addition to the other payments provided in said contract No. 2318, as part of the cost of production of the engines, the full cost of the facilities for testing and inspecting the engines forming the subject matter of said contract, including the buildings and equipment erected and supplied by the Contractor therefor. These buildings and equipment are intended to include all of the buildings and equipment erected on the testing field provided by the Contractor for that purpose. The cost of these facilities shall be paid by the Government as soon as the same is properly audited. This does not include the testing equip-
49 ment of the Contractor located in his principal factory building at North Elizabeth, New Jersey.

4. It is understood and agreed that the Government will from time to time make such advance payments on this contract to the Contractor as in the opinion of the Government the financial needs of the Contractor may from time to time require, and upon such terms and upon such security as shall be deemed adequate for the protection of the Government by the Secretary of War.

5. It is understood and agreed that in view of the modifications of said original contract herein agreed upon, that the Government shall place an additional order with the Contractor for Five Hundred (500) 12-cylinder U. S. A. standardized aircraft engines, the schedule for deliveries for which shall be agreed upon prior to February 1, 1918, or shall place an order with the Contractor for aviation engines of different design of approximately equal volume and sales value, subject to the same general conditions, including provisions for cancellation, as in said contract No. 2318, and provided that the Contractor agrees to make no commitments for material for said

additional Five Hundred (500) aircraft engines, until notified to do so by the Government.

In witness whereof the party of the first part has caused this agreement to be executed by its proper officers hereunto duly authorized, and the United States of America has caused this agreement to be executed by the undersigned Contracting Officer hereto duly authorized.

DUESENBERG MOTORS CORPORATION,
By J. R. HARBECK,
President.
A. C. DOWNEY,
Major, Signal Corps, United States Army.

I. V. K. VAIL,
JULIAN H. HARRIS,
F. D. SCHNACKE.

Approved December 12, 1917.
(Sgd.) GEORGE O. SQUIER,
General, Chief Signal Officer of the Army.

50 EXHIBIT "C."

Contract No. 2318-B.

Order No. 30087-B.

Req. No. A6792.

Signal Corps, United States Army.

Supplemental Contract for Aeronautical Equipment.

These articles of agreement, entered into this 4th day of January, 1918, by and between Duesenberg Motors Corporation of New York City, N. Y., a corporation organized and existing under the laws of the State of New York, hereinafter called the "contractor," party of the first part, and the United States of America, hereinafter called the "Government," represented by A. C. Downey, Signal Corps of the United States Army, hereinafter referred to as the "Contracting Officer," acting by authority of the Chief Signal Officer of the United States Army, and under the direction of the Secretary of War, party of the second part, witnesseth:

Whereas, the Contractor and the Government entered into a contract for the manufacture and supply of five hundred (500) U. S. A. standardized 12-cylinder aircraft engines, which contract is contract No. 2318, Order No. 30087, dated November 29th, 1917, and

Whereas, said contract No. 2318 has been modified by a Supplemental Agreement made and entered into by the Government and the Contractor on the 11th day of December, 1917, changing the amount of fixed profit which the Contractor is entitled to receive

under the terms of said contract No. 2318, from Nine Hundred Thirteen Dollars and Five Cents ($913.05) to Six Hundred Twenty-five Dollars ($625.00), and changing the estimated cost upon which savings are to be based from Six Thousand Eighty-seven Dollars ($6,087.00) to Five Thousand Dollars ($5,000.00); and providing further, that, in addition to other payments to be made under
51 the provisions of said contract No. 2318, there shall be paid an amount for depreciation upon certain buildings and equipment, and certain machine tools acquired by the Contractor for the purposes of said contract, upon certain terms and conditions in said Supplemental Agreement contained; and providing, further, for the payment by the Government of the cost of certain facilities for testing and inspecting the engines forming the subject matter of said contract, according to certain terms and conditions in said Supplemental Agreement contained; and providing, further, for an advance to the Contractor upon security satisfactory to the Secretary of War; and providing, further, for the manufacture by the Contractor of five hundred (500) additional 12-cylinder U. S. A. standardized aircraft engines, subject to the same general conditions contained in said contract No. 2318, and

Whereas, it is desired by this second Supplemental Agreement to further modify certain terms and conditions of said contract No. 2318, and of said Supplemental Agreement made and entered into the 11th day of December, 1917:

Now, therefore, the said parties have agreed and by these presents do agree to and with each other as follows:

Article I.

That, subject to all the provisions of Article I in said contract No 2318 contained, the Contractor shall make for the Government, instead of the articles described in Article I of said contract, two thousand (2,000) Bugatti motors, and such spare parts for said motors as the Government may order from time to time during the period of the construction of said motors, in accordance with specifications to follow.

Article II.

That, subject to all the conditions of Article III in said contract No. 2318 contained, the Contractor agrees to deliver said articles according to the following schedule:

52

1918.	March	10
	April	50
	May	150
	June	400
	July	500
	August	500
	September	390
	Total	2,000

Deliveries of spare parts shall be made as nearly as may be at the same time as the motors to which they apply, and as ordered by the Government.

Article III.

That, subject to all the terms and conditions of Article IV in said contract No. 2318 contained, the amount of fixed profit which the Contractor is entitled to receive, which amount was modified by paragraph 1 of the First Supplemental Agreement hereinabove referred to, shall be and hereby is changed from Six Hundred Twenty-Five Dollars ($625.00) to Seven Hundred Fifty Dollars ($750.00) for each motor.

Article IV.

That, subject to all the terms and conditions of Article VI in said contract No. 2318 contained, the estimated cost for each of the articles delivered upon which savings are to be based, which estimated cost was modified by paragraph 1 of said First Supplemental Agreement hereinbefore referred to, shall be and hereby is changed from Five Thousand Dollars ($5,000.00) to Six Thousand Dollars ($6,000.00); and the fixed profit provided in Section 6 of Article VI of said contract, which fixed profit was modified by said First Supplemental Agreement, shall be and hereby is changed from Six Hundred Twenty-Five Dollars ($625.00) to Seven Hundred Fifty Dollars ($750.00) as hereinabove in Article III provided.

53

Article V.

That, in addition to the other payments to be made to the Contractor under the provisions of said contract No. 2318, there shall be paid by the Government to the Contractor the sum of twelve and one-half per cent (12½%) of the actual cost of spare parts for said motors delivered to and accepted by the Government during the period of construction of said motors, and such amount, if any, payable upon completion of the manufacture of the articles, as herein provided, in addition to the twelve and one-half per cent (12½%) of the actual cost of spare parts, as will make the profit payable for spare parts bear the same proportionate relation to the actual cost of spare parts as the sum of the fixed profit and the amount allowed the Contractor for saving on engines bears to the actual cost of the engines, as provided in Section 7, Article VI, of said contract No. 2318.

Article VI.

That all costs and expenses incurred by the Contractor in connection with said contract No. 2318, as amended by said First Supplemental Agreement of December 11th, 1917, shall be allowed and paid for by the Government as a part of the cost of manufacture of the said Bugatti engines herein provided for; such costs and expenses shall be determined as set forth in Article VII of said contract No.

2318, and shall be subject to all the provisions therein contained as to the allocation of the same.

Article VII.

That all the provisions of said contract No. 2318, except as herein modified, and paragraphs 2, 3 and 4 of the said First Supplemental Agreement of December 11th, 1917, shall remain in full force and effect.

In witness whereof the party of the first part has caused this contract to be executed by its proper officer thereunto duly authorized and the United States of America has caused this contract
54 to be executed by the undersigned Contracting Officer hereto duly authorized.

DUESENBERG MOTORS CORPORATION,
By J. R. HARBECK,
President.
A. C. DOWNEY,
Major, Signal Corps, United States Army.

Witnesses:
JOHN A. LAIBUN.
GUY LEONARD.
O. R. EWING.
G. T. ROWLEY.

Approved January 8, 1918.
(Sgd.) GEORGE O SQUIER
Major General, Chief Signal Officer of the Army.

Certificate of authenticity with seal of Department of the Interior.
R A—6792. Est. Cost $12,400,000.00.
E. P. S.

Order No. 30087-B.

—— Department.

Office of the Chief Signal Officer.

Washington.

January 11, 1918.

From: Office Chief Signal Officer.
To: Duesenberg Motors Corporation, 120 Broadway, New York, N. Y.
Subject: Order for engines and parts.

In accordance with contract (HSW).
I am directed by the Chief Signal Officer of the Army to place order with you for the articles listed below.
Inspection: Goods must be ready for inspection at your factory within see contract days after receipt of order. When ready for in-

spection notify Chief Inspector, Airplanes & Airplane Engines, Signal Corps, at your factory.

Items accepted should be packed for domestic shipment and furnished F. O. B. New York, N. Y.

55 Forward on Government bill of lading which will be sent you by the Traffic Branch, Signal Corps, 359 Union Terminal, Washington, D. C. See instructions on reverse side.

Immediately after shipment the consignment should be listed in detail, the original copy on Form 27 (Shippers' receipt), and one carbon copy on Form 27A (shipping notice), and these lists forwarded to the Traffic Branch, Signal Corps, 359 Union Terminal, Washington, D. C., accompanied by memorandum copy of bill of lading.

Bill upon Forms 330A and 29 inclosed herewith, observing carefully the instructions on the reverse side of Form 330A.

Shipping Instructions and Marking.

Marked "Order 30087-B Aero."

Shipping instructions will be furnished you later.

Item.

1. 2,000 Engines, Bugatti, and necessary spare parts for same, as per contract, at $— each, $——

NOTE.—Early shipment is urgent, therefore please arrange for inspection in ample time to avoid any delay in delivery. A close observance of marking instructions and the enclosure of packer's lists is requested and will be appreciated.

The above engines to be serially numbered from 40672 to 42671 inclusive, the serial numbers to be preceded by the letters "S. C."

A. C. DOWNEY,
Major, Signal Corps.

Contract No. 2318-B will follow.
App. L. A. S. C. 18 (202).
T. R.
Copies to cd-fu-pos-id4-tb-1ex-bu-plant-shepler-harris-eps-conti-pe2-6.
Incls. 5 K.

53 EXHIBIT "D."

Certificate of authenticity with seal of Department of the Interior.

Contract #2318C.

Order #30087C.

Signal Corps, United States Army.

Supplementary Agreement.

In consideration of the mutual promises hereinafter mentioned, and other valuable considerations, it is hereby mutually agreed between the Duesenberg Motors Corporation, a corporation organized and existing under and pursuant to the laws of the State of New York, having its general offices at 120 Broadway, New York City, hereinafter described as contractor, and the United States of America hereinafter described as the Government acting by A. C. Downey, Major, Signal Corps, United States Army, hereinafter described as the contracting officer as follows:

Article I. This agreement is supplementary to the contract between the parties hereto, dated November 20, 1917, being contract numbered 2318, and to two supplementary contracts between the parties hereto dated respectively December 11, 1917, and numbered 2318, dated January 4, 1918, and numbered 2318B. Under these contracts the contractor agreed to deliver to the Government supplies consisting of two thousand, sixteen cylinder, bugatti aeroplane engines in the terms specified in the said contracts.

Article II. In the interest of both parties and in order to expedite the delivery of the said supplies, the Government will advance to the contractor under the above mentioned contracts an amount not more than One Million Two Hundred Fifty Thousand Dollars, $1,250,000, conditioned on the approval of the War Credits Board
57 and on the terms hereinafter mentioned, and will make payment by check directly to the contractor.

Article III. The contractor will endorse and deposit the said check with the Bankers Trust Company under such instructions as may be approved by the contracting officer, as will permit withdrawal to be made only by check countersigned by a representative of the contracting officer. The contracting officer will also certify by one of its executive officers, either on each check of withdrawal, or by separate instrument countersigned by the representative of the contracting officer and accompanying such check of withdrawal that the amount of the check will be used by the contractor only for buildings and equipment, materials, work, labor and services, furnished by the contractor in the amounts specified in the said certification in direct performance of the contracts referred to in Article I hereof.

Article IV. The contractor will repay to the Government the amount of the said advance with simple interest at the rate of five per cent (5%) per annum on the outstanding portion of the said advance by deductions which the disbursing officer of the Government is hereby authorized to make from time to time of ten per cent (10%) from the amounts of all vouchers which would otherwise become due in the full amounts thereof, to the contractor from the Government on the delivery of supplies under the contracts referred to in Article I hereof. These deductions will be made until the outstanding balance of the said advance, with interest, is less than ten per cent (10%) of the amounts of any vouchers presented for payment, and thereafter the deductions will be of such amounts only as will constitute complete repayment of the balance of the said advance with interest. If the contractor for any reason, whether through the contractor's own fault or otherwise, shall not furnish to the Government the supplies in whole or any part thereof, as provided in the contracts referred to in Article I hereof, or if the Government shall terminate said contracts, the contractor will return to the Government on demand any balance of the said advance, with interest, after deducting the total of any repayments made as hereinabove provided, and of all liquidated accounts that may be due and owing under said contracts from the Government to the contractor.

Article V. As security for the repayment of the above mentioned advance, and any interest due thereon, the contractor will furnish to the Government the demand note of the contractor dated today for One Million Two Hundred Fifty Thousand Dollars $1,250,000, with interest at the rate of five per cent (5%) per annum and payable to the Secretary of War on behalf of the United States at his office in Washington.

So long as any portion of the said advance, with interest, remains unpaid by the contractor to the Government, the contractor will not pledge or in any way encumber its property and assets of every kind whatsoever in any way concerned in the performance of the contract referred to in Article I hereof, and if any claims of lien or otherwise is made against any of such property or assets, the contractor will immediately furnish a bond for the said claim.

The contractor will not pay any dividends on its capital stock until the entire amount of the above mentioned advance, with interest, shall have been repaid to the Government.

Article VI. On the complete performance by the contractor of its obligations hereunder, the Government will return to the contractor the note referred to in Article V hereof.

Article VII. Except as hereinabove provided, the contracts referred to in Article I hereof are unchanged by this agreement.

Secretary of War on behalf of the United States at his office in Washington, D. C.

b. A deed to the Secretary of War, on behalf of the United States, of the real estate, buildings, equipment, tools and machinery, known as the F. I. A. T. plant and situated in Poughkeepsie, New York. Said deed will be executed in such form as may be approved by the War Credits Board and the contractor will furnish with the deed a title insurance policy issued by an insurance title company, satisfactory to the War Credits Board, that the title to the premises described in the deed is vested in the contractor and unincumbered, and will record said deed in accordance with the law of the State of New York.

The contractor may retain possession of the premises covered by said deed while not in default under this agreement and may remove from said premises such machinery as the contractor may require in its other factories for the performance of the Principal Agreement. The contractor may sell or exchange such part of the
62 said machinery as may be no longer used or useful or required by it in the performance of the Principal Agreement, free from any lien, right or claim of the United States therein, provided that the contractor shall apply the proceeds of sale or exchange to the replacement of the machinery so sold or exchanged with other machinery necessary for the performance of the Principal Agreement, and that the title to the machinery so acquired shall be transferred to the Government as further security for the repayment of the said advance with interest. The contractor will not lease any part of said premises except as subject to the rights of the United States under said deed and this agreement.

All expenses incurred in furnishing and delivering to the Government the above described note, deed and title policy will be borne by the contractor.

On the failure of the contractor, at any time, to comply with the terms of this agreement, the Government may sell the above described note and/or the premises conveyed to the Secretary of War on behalf of the United States by the above described deed, and/or any other security hereunder, at public or private sale or otherwise, and with or without notice to the contractor, applying the proceeds after payment of the costs of sale toward the repayment of the above mentioned advance, and interest due thereon, and accounting to the contractor for the balance, if any. The Government may become the purchaser of the note and/or the premises, and/or any other security above mentioned, at any such sale, free of all trust and claims whatsoever.

Article VI. The Government will not negotiate nor demand payment of the note mentioned in the preceding Article so long as the contractor is not in default under this agreement or under the Principal Agreement.

Article VII. The contractor will not pledge nor place any lien or encumbrance, nor suffer any lien or encumbrance to be placed,

on its property or assets of any kind whatsoever, and will not pay any dividends on its capital stock until the entire amount of the above mentioned advance, with interest thereon, as aforesaid, shall have been repaid to the Government.

63 Article VIII. On the complete performance by the contractor of its obligations hereunder, the Government will return to the contractor the note referred to in Article V hereof and the Secretary of War will execute, on the request of the contractor, a reconveyance to the contractor of the property covered by the deed referred to in Article V hereof, and any other security hereunder.

Article IX. Any right herein given to the Government may be exercised by the Secretary of War or the contracting officer. The existence of any default hereunder on the part of the contractor may be determined by the Secretary of War or the contracting officer, and his determination shall be final and binding on the parties. The terms Secretary of War and contracting officer, as used herein, shall refer to any successor in office of either of them and any power herein given either of them may be exercised by a representative of either of them duly authorized.

Article X. Except as hereinabove provided, the Principal Agreement is unchanged by this agreement.

In witness whereof the parties hereto have signed and sealed this agreement by their respective representatives this 11th day of February, 1918.

Executed in six parts.

DUESENBERG MOTORS CORPORATION,
By J. R. HARBECK.
A. C. DOWNEY,
Major, Signal Corps, United States Army.

Attest:

R. H. CROSBY,
Secretary.

Witnesses:

As to A. C. Downey.
L. B. PRESTON.

Approved: March 1, 1918.

____ ____,
Major General, Chief Signal Officer.

64 EXHIBIT "F."

Contract No. 2318-D.

Order No. 30087-D.

Signal Corps United States Army.

Supplemental Contract for Aeronautical Equipment.

These articles of agreement, entered into this 14th day of February, 1918, by and between Duesenberg Motors Corporation, a corporation organized and existing under the laws of the State of New York, hereinafter called the "Contractor," party of the first part, and the United States of America, hereinafter called the "Government," represented by A. C. Downey, Major, Signal Corps of the United States Army, hereinafter referred to as the "Contracting Officer," acting by authority of the Chief Signal Officer of the United States Army and under the direction of the Secretary of War, party of the second part, Witnesseth:

Whereas, the Contractor and the Government entered into a contract for the manufacture and supply of Five Hundred (500) U. S. A. Standardized 12 cylinder Aircraft Engines, which contract is Contract No. 2318, Order No. 30087, dated November 20th 1917, and,

Whereas, said Contract No 2318 has been modified and supplemented by three agreements numbered respectively, 2318 dated December 11th, 1917, 2318-B dated January 4th, 1918, and 2318-C dated January 15th, 1918, and,

Whereas, by virtue of the provisions of Contract No. 2318 dated November 20th, 1917, as so modified and supplemented, the Contractor became and is obligated to manufacture and supply to the Government, two thousand (2,000) Bugatti motors and spare parts therefor, according to the schedule therein provided, instead of said five hundred (500) U. S. A. Standardized 12 cylinder Aircraft Engines, and,

65 Whereas, for the proper performance of said Contract No. 2318 dated November 20th, 1917, as so modified and supplemented it has become necessary for the Contractor to enlarge its heat treating building at Elizabeth, New Jersey, and to establish therein an assembly plant, and,

Whereas, since the making of said Contract 2318 dated November 20th, 1917, and said modifying and supplemental agreements, the Contractor at the Government's request and in order to reduce the cost to it of the above mentioned Bugatti motors and spare parts and hasten the delivery thereof, by avoiding the necessity of subcontracting a large portion of the work to be performed under said contracts, has purchased for the sum of four hundred thousand ($400,000.00) Dollars, of the F. I. A. T., a corporation organized and existing under the laws of the State of New York, the equipment,

machinery and real property agreed to be sold and conveyed by a certain agreement dated January 31st, 1918, a true copy of which is hereto attached as schedule "A."

Now, therefore, it is agreed as follows:

1. That the Contractor will, in so far as is practicable, make use of said last mentioned equipment and machinery in and about the performance of said contract No. 2318, dated November 20th, 1917, supplemented and modified as aforesaid, with a view to reducing the cost to the Government and hastening the delivery of said Bugatti motors and spare parts.

2. That in addition to the other payments to be made to the Contractor under the provisions of said contract No. 2318, dated November 20th, 1917, and said modifying and supplemental agreements No. 2318, dated December 11th, 1917, No. 2318-B dated January 4th, 1918, and No. 2318-C dated January 15th, 1918, there shall be paid by the Government to the Contractor, upon the termination of said Contract No. 2318 dated November 20th, 1917, and said modifying and supplemental agreements, an amount for depreciation upon the Contractor's heat treating building at Elizabeth, New Jersey, constructed, as aforesaid, for the purpose of performing said contract, including the portion thereof in which the Con-
66 tractor's assembly plant is located, and upon the said equipment, machinery and real property to be determined as follows:

The cost of said heat treating building, including the portion thereof in which the Contractor's assembly plant is located, and of said equipment and machinery, shall be determined. The cost of said equipment and machinery if conveyed to the Contractor pursuant to said agreement, dated January 31st, 1918, is hereby fixed and determined as Two Hundred and Fifty Thousand Dollars ($250,000.00). Upon the termination of the said Contract No. 2318, dated November 20, 1917, and said modifying and supplemental agreements, the value to the Contractor for use in the Contractor's business of said heat treating building, including the portion thereof in which the Contractor's assembly plant is located, and of said last mentioned equipment and machinery, shall be determined by a board consisting of three (3) persons; one to be chosen by the Chief Signal Officer of the Army; one to be chosen by the Contractor, and one to be chosen by the nominee of the Contractor. In determining this value, such appraisers shall be guided by the use, if any, which the Contractor shall have for such heat treating building, equipment and machinery, at the termination of said contract No. 2318, dated November 20, 1917, and said modifying and supplemental agreements, in the ordinary operation of its business of manufacturing internal combustion engines, and shall not include the value, if any, which the same may have to the Contractor in the manufacture of further aviation motors.

The cost of said real property agreed to be conveyed in said agreement dated January 31st, 1918, shall be determined. The cost thereof, if conveyed to the contractor pursuant to said agreement, is

hereby fixed and determined as One Hundred and Fifty Thousand Dollars ($150,000.00).

The value of said real property, at the termination of said contract and modifying and supplemental agreements, or at the time of the disposal thereof, if previously disposed of by the Contractor,
67 shall be determined by said Board, and if said value shall exceed its cost determined as aforesaid, then, the amount of such excess shall be deducted from the amount of depreciation upon said equipment and machinery determined as aforesaid. If the value of said real property, as so determined, shall be less than its said cost, then the amount of the difference between said value and said cost shall be added to the amount of depreciation upon said equipment and machinery determined as aforesaid.

Provided, however, that if any further contracts are entered into between the Government and the Contractor for aviation motors, no further depreciation shall be claimed or allowed thereon, in excess of the ordinary depreciation upon the value as thus determined.

3. That all the provisions of said Contract No. 2318, dated November 20, 1917, and of said modifying and supplemental agreements number- respectively 2318, dated December 11, 1917, 2318-B dated January 4, 1918, and 2318-C, dated January 15, 1918, except as herein modified, shall remain in full force and effect.

In witness whereof, the party of the first part has caused this contract to be executed by its proper officer thereunto duly authorized and the United States of America has caused this contract to be executed by the undersigned Contracting Officer hereto duly authorized.

A. C. DOWNEY,
Major, Signal Corps, United States Army.
DUESENBERG MOTORS CORPORATION,
By J. R. HARBECK,
President.
GEORGE O. SQUIER,
Major General, Acting Chief Signal Officer of U. S. Army.

Witnesses:

JOHN L. CARY.
F. D. SCHNACKE.

Attest:

R. H. CROSBY,
Secretary.

Approved Feb. 26, 1918.

68 EXHIBIT "G."

Resolution of Directors Duesenberg Motors Corporation Authorizing Execution of Foregoing Contract.

Schedule A.

This agreement, made this 31st day of January, 1918, between Joseph S. Josephs, as President of the F. I. A. T., a corporation duly organized and existing under the laws of the State of New York, party of the first part, hereinafter called the "Vendor," and the Duesenberg Motors Corporation, also organized and existing under the laws of the State of New York, party of the second part, hereinafter called the "Vendee," witnesseth:

In consideration of the mutual covenants and agreements herein contained, the parties hereto agree as follows:

First. The Vendor agrees to sell and convey, or cause to be conveyed by good and sufficient deeds or instruments in writing conveying good and sufficient title thereto (except as hereinafter mentioned) to the Vendee all and singular of the following:

a. The entire equipment and machinery as now installed, except jigs, special tools and small tools that are used in the manufacture of the F. I. A. T. car. This does not include any raw materials or spare parts of the F. I. A. T. car, all located at the plant of the F. I. A. T. Company, Poughkeepsie, New York.

b. All and singular the following described real property located in Poughkeepsie, New York, viz: the property described in deed to F. I. A. T. from the Fairview Improvement Company dated July 22, 1910, subject to the exceptions in the policy of title insurance No. 26655 on said property issued by the Title Insurance Company of New York; and the property described in deed from the Fairview Improvement Company dated October 8, 1909, to F. I. A. T. subject to the exceptions described in policy of the Title Insurance Company of New York on said property No. 26655, and also the right, title and interest of F. I. A. T. in the property described in deed
69 dated November 22, 1916, from the Fairview Improvement Company, and the right, title, and all interest of F. I. A. T. in an indenture between the City of Poughkeepsie and said Company dated June 13, 1910.

Vendor agrees that the title to the personal property above described shall be good and perfect; and that the title to the first two parcels of real property above described shall be good and perfect, with the exception of the exceptions in said two Title Insurance Company policies above mentioned.

Second. Vendee agrees to pay for all and singular machinery and equipment above described, and Vendor agrees to accept in full pay-

ment for same the sum of $250,000.00, of which sum $245,000.00 shall be paid to Vendor upon the delivery of said machinery and equipment, and a good and sufficient bill of sale transferring good title to the same, at the office of the Vendee in the City of New York within 30 days from the date hereof.

Vendee agrees to pay for all and singular real property above described, provided the title thereto is as above represented and Vendor agrees to accept for same the sum of $150,000.00, payable at the office of the Vendee, No. 120 Broadway, in the City of New York, within thirty days from date hereof.

Third. Vendee agrees to pay vendor upon the execution of this contract the sum of $10,000.00, the receipt whereof is hereby acknowledged by Vendor; and it is agreed that said sum of $10,000.00 shall be credited against the sums heretofore agreed to be paid for the above described property, personal and real, as follows:

$5,000.00 upon the sum agreed to be paid for said personal property, and $5,000.00 the sum to be paid for real property.

Vendor agrees and warrants that he has good right to make this agreement, and that he will transfer or cause to be transferred to Vendee all the above described property as above set forth, and that upon the delivery of said bill of sale and of said personal property that Vendee may forthwith take possession of said real and personal property.

It is agreed that should Vendor be unable to give good title to the above mentioned real and personal property that then the
70 sum of $10,000.00 heretofore paid by Vendee to Vendor shall be immediately repaid by the Vendor to Vendee, and there shall be no other obligations or liability from the parties hereto against the other arising out of the signing and execution of this agreement.

In the event that the Vendor is unable to give good and sufficient title to the real estate hereinbefore described within the time stipulated in this agreement then and in that event the said Vendor may have the option to give possession of the said real estate over and unto the Vendee for its use and occupation, pending the period of time herein stipulated, to wit: one year within which to procure and deliver over to the Vendee such good and marketable title to the real estate hereinbefore described, provided Vendor is able to give Vendee rightful possession of the same during said period of time, and provided Vendor has delivered to Vendee good title to said personal property. In the event that possession is given to the Vendee of the real estate without title in the manner hereinbefore set forth, the amount stipulated to be paid by Vendor for such real estate, to wit: in the sum of $145,000.00, shall only be paid over by the Vendee to the Vendor when good and sufficient title is given.

It is understood that thirty feet of a part of the real property above mentioned has been conveyed by F. I. A. T. to the Town of Poughkeepsie, for the purpose of a public highway, and the title to said thirty feet is not hereby warranted or conveyed, except as any interest of the Vendor may have therein.

In witness whereof the party of the first part has set his hand and seal, and the party of the second part has caused this agreement to be signed by its Secretary the day and year first above written.

F. I. A. T.,
By J. S. JOSEPHS,
President.

[Corporate Seal.]

DUESENBERG MOTORS CORPORATION,
By J. A. HARBECK,
President.

In presence of:

LOUIS STECKLER.

71 EXHIBIT "H."

Certificate of authenticity with seal of Department of the Interior.

Contract No. 2318-F.

Order No. 30087-B.

Bureau of Aircraft Production,

United States Army.

This contract, made and entered into this 26th day of September, 1918, by and between Duesenberg Motors Corporation, a corporation of the State of New York, hereinafter called the "Contractor," party of the first part, and the United States of America, hereinafter called the "Government," represented by O. R. Ewing, Captain, A. S. A. P., hereinafter referred to as the "Contracting Officer," acting under the direction and by the authority of the Secretary of War, party of the second part, witnesseth: That

Whereas, the parties hereto have heretofore entered into six contracts known as Contracts Nos. 2318, 2318-A, 2318-B, 2318-C, 2318-D and 2318-E, dated respectively November 20, 1917, December 14, 1917, January 4, 1918, January 15, 1918, February 14, 1918, and February 11, 1918, whereby the Contractor is now manufacturing for the Government two thousand (2,000) Bugatti Engines; and

Whereas, under the terms of Section (3) of said Contract No. 2318-A, it is provided that the Government shall pay the full cost of facilities for testing and inspecting the said engines, including the buildings and equipment erected and supplied by the Contractor therefor; and

Whereas, said Section (3) contemplated that said facilities should be temporary and erected on a separate testing field to be provided by the Contractor; and

Whereas, the Contractor is now erecting a permanent testing building in connection with its plant and the Government is unwilling

to pay the entire cost of said building, unless provision be
72 made for the ultimate disposition thereof and the Contractor is willing to buy the said building on the termination of this contract on the terms hereinafter set forth:

Now, therefore, in consideration of the promises and of the mutual covenants and agreements hereinafter contained, the parties hereto mutually covenant and agree as follows:

Article I.

The Government will pay, under the terms of Section (3) of said Contract No. 2318-A, the entire cost of the testing building now being erected at the plant of the Contractor at Elizabeth, New Jersey. The cost of such building shall be determined and payments therefor shall be made in accordance with the provisions of Contract No. 2318 between the parties hereto, as amended.

Article II.

Upon the termination of said Contract No. 2318, the value of said building to the Contractor for use in its business, shall be determined by a Board consisting of three persons, one to be chosen by the Director of Aircraft Production, one to be chosen by the Contractor, and the third to be chosen by the two so first selected. In determining this value, such appraisers shall be guided by the use, if any, which the Contractor shall have for said building at the termination of said Contract No. 2318 in the ordinary operation of its business of manufacturing internal combustion engines and shall not include the value, if any, which the same may have to the Contractor in the manufacture of further aviation motors; provided, however, that if any further contracts are entered into between the Government and the Contractor for aviation motors, or parts thereof, no further depreciation shall be claimed or allowed thereon in excess of the ordinary depreciation upon the value as thus determined. Upon such determination, the Contractor hereby agrees to buy from the Government, and the Government agrees to sell to the Contractor the
73 said building and to pay therefor the said appraised value.

Article III.

Except as herein otherwise provided, said contract No. 2318 as supplemented and amended by said contracts Nos. 2318-A, 2318-B, 2318-C, 2318-D and 2318-E, shall remain in full force and effect.

In witness whereof, the parties hereto have caused this instrument to be executed by their respective proper officers thereunto duly authorized, the day and year first above written.

DUESENBERG MOTORS CORPORATION,
By J. R. HARBECK,
President.

UNITED STATES OF AMERICA,
By O. R. EWING,
Captain, A. S. A. P.

Attest:
R. H. CROSBY,
Secretary.

Witnesses:

W. S. NUT.
ZELMA I. CHAPMAN.
S. M. WILEY.

Extracts from by-laws and election of officers Duesenberg Motors Corporation.

E. P. Decker, Assistant to the President.

June 3, 1918.

Office Director of Aircraft Production.
War Department, Washington, D. C.

GENTLEMEN:

We have to acknowledge receipt of your letter of May 24th advising us of the cancellation of Order No. 30087 covering 500 Liberty
74 engines and spare parts, and that this has been superseded by Order No. 30087-B, covering 2,000 Bugatti engines and the necessary spare parts for same.

We understand, that in cancelling order No. 30087, it in no way affects the contract-agreement for the production of the 500 Liberty engines, as this contract was amended in order to cover the contract for the Bugatti engines, without cancellation.

Yours very truly,

DUESENBERG MOTORS CORPORATION.
E. P. DECKER.

E. P. D.-N. W.

Contract Section.
Heha.

Office Director of Aircraft Production.

June 6, 1918.

Duesenberg Motors Corpoartion.

Attention Mr. E. P. Decker, Elizabeth, N. J.

Contract 2318-B.

1. Receipt is acknowledged of your letter dated June 3, 1918, in which you state "We understand that in cancelling order 30087, it in no way affects the contract agreement for the production of 500 Liberty Engines, etc."

2. In order that there may be no misunderstanding between your Company and this office as to the orders now in effect, you are advised that order 30087 which calls for 500 Liberty Engines and Spare Parts was cancelled.

3. Order 30087-B, which calls for 2,000 Bugatti Engines, superseded and was issued in lieu of order 30087. At this time your Company is manufacturing for the Bureau of Aircraft Production 2,000 Bugatti Motors under order 30087-B, contract 2318-B. Any other order which you may have had covering Liberty Motors has
75 been cancelled, but the cost provisions and other terms of contract 2318 remain in full force and effect, except as modified by the various supplemental contracts.

By direction of the Director of Aircraft Production.

F. D. SCHNACKE,
1st Lieut., A. S. Sig. R. O.

Office of the Director of Aircraft Production.

August 23, 1918.

Mr. J. R. Harbeck, Pres. Duesenberg Motors Corp.,
Elizabeth, N. J.

Settlement of Motor Test House Question.

1. With reference further to the matter of a settlement of the motor test house question under contract #2318 and supplemental contract #2318-A, it is well understood between us that in contract #2318 it is specifically stated that all property paid for by the Government shall become the property of the Government.

2. On the other hand, contract #2318-A certainly stipulated that the Government shall pay, as part of the cost of the production of the engines, for the facilities for inspecting, testing, etc. This clause however, evidently contemplated that the test house, buildings and equipment should be temporary and erected on a testing field removed from the main motor plant, and is not intended to include testing equipment located in the principal factory building at Elizabeth.

3. This opens up a complicated question which I think can and should be settled as follows: The Government should own the test house, but that is complicated by the fact that it is built on land owned by the Duesenberg Motors Corporation. However, a contract can be made between the Duesenberg Motors Corporation and the Government stipulating that at the end of the Contract the Duesenberg Co., will purchase from the Government these facilities at what they may be worth at that time as determined by an impartial Board of Appraisal, the appraisal to be made in the same manner as outlined on page two of supplemental contract #2318-A cover-
76 ing heat treating facilities, which bases the appraisal upon the method followed in the ordinary operation of its business in the manufacture of internal combustion engines.

4. In view of the conflicting terms of the contract, I should like to have you accept this proposal and, furthermore, it seems to me a fair adjustment.

By authority of the Director of Aircraft Production.

W. C. POTTER,
Assistant Director of Aircraft Production.

Copy to Finance Dept.

Duesenberg Motors Corporation.

August 30, 1918.

Mr. Wm. C. Potter,
Asst. Dir. of Aircraft Production,
Bureau of Aircraft Production,
4½ & Missouri Sts.,
Washington, D. C.

Settlement of Motor Test House Question.

DEAR SIR:

Your proposal of August 23rd relative to the settlement of the motor test house question was duly received. The proposal made in your letter is hereby accepted.

It is our understanding that a supplemental contract will be drawn covering the settlement upon this basis. May we ask that this be done as speedily as possible?

Yours truly,

J. R. HARBECK,
President.

EXHIBIT "I."

War Credits Board.
No. —, Bureau of Aircraft Production.
Contract No. 2318-G.
Order No. 30087.

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Duesenberg Motors Corporation

and

United States of America.

Supplemental Agreement for Advance Payment.

In consideration of the mutual promises hereinafter mentioned, and other valuable consideration, it is agreed by and between Duesenberg Motors Corporation, incorporated under the laws of the State of New York, with an office at 120 Broadway, New York City (hereinafter described as contractor), of the one part, and the United

States of America (hereinafter described as the Government), acting by the officer whose name first appears below (hereinafter described as the contracting officer), of the other part, as follows:

Article I. This agreement is supplemental to a contract between the parties hereto, dated Nov. 20, 1917, numbered 2318, as amended:

Dec. 11, 1917,
Jan. 4, 1918,
Feb. 14, 1918,
Sept. 26, 1918,

together with further modifications and amendments, if any, and acceptances thereof by the contractor (hereinafter collectively referred to as the Principal Agreement), under which the contractor agreed to deliver to the Government supplies consisting of 2,000 Bugatti Motors and spare parts; and is also supplemental to two Supplemental Agreements dated Jan. 15, 1918, and Feb. 11, 1918, respectively, in accordance with which agreements the Government has heretofore made two advance payments of $1,250,000 and $400,000 respectively, to the contractor.

Article II. In the interest of both parties hereto, and in order to expedite the delivery of the said supplies, the Government shall make an advance payment (in addition to the two prior advance payments) to the contractor under the Principal Agreement,
78 to an amount not exceeding the sum of One Million Two Hundred Fifty Thousand Dollars ($1,250,000) on the terms and security hereafter mentioned, and shall make payment by checks directly to the contractor as follows: $500,000 at once and the balance as and when requested by the contractor on authorization of the War Credits Board.

Article III. The contractor shall endorse and deposit the said checks in a special account or accounts, separate from its other funds, in a bank or banks, under instructions in accordance with the terms of this agreement and approved by the officer in charge of the Finance Division of the Bureau of Aircraft Production (hereinafter called the "Finance Officer").

The contractor shall also deposit in like manner other amounts received from the Government as reimbursements for expenditures made by the contractor directly or indirectly from such special account or accounts. Unless otherwise authorized in writing by the War Credits Board, withdrawals from such special account or accounts shall be made only for the purpose of paying for the following items: such additions to plant and equipment, materials and labor and other expenses as are required in the direct performance of the Principal Agreement and for paying present obligations of the contractor incurred for such purposes other than bank loans, provided, however, that an amount not in excess of $50,000 may be withdrawn from such special account or accounts to repay bank loans, the proceeds of which were expended for such purposes.

Withdrawal from such special account or accounts shall be made

in accordance with the aforesaid provisions and approved instructions of the Finance Officer and by check of the contractor. All checks shall be accompanied by a certificate signed by the contractor stating "payment covered is for purposes authorized in Supplemental Agreement."

In the event of the completion or earlier termination of the Principal Agreement, all funds in said special account or accounts shall be returned to the Government by the bank or banks in which they were deposited and shall be credited to this and the two
79 prior advance payments, but in no event shall the Government receive more from said bank or banks than the unapplied (unreturned) portion of said advance payments plus the interest then accrued on the outstanding balances of said advance payments; remainder of such deposit or deposits, if any, shall be paid directly to the contractor.

Article IV. The contractor shall, as hereinafter provided, account to the Government for the amount of this advance payment, with interest on the outstanding balances thereof at the rate of seven per cent per annum for the month now current and thereafter at such rate or rates as the War Credits Board may from month to month determine.

This and the two prior advance payments shall be applied and credited in part payment for the supplies to be furnished by the contractor under the Principal Agreement; and for this purpose the contractor authorizes the Government, acting through its proper disbursing officer, to deduct twenty-five per cent from the gross face amount of each voucher hereafter presented by the contractor under the Principal Agreement until such deductions shall equal the principal of the said advance payments and interest accrued on the outstanding balances thereof, the dates when vouchers are paid to govern in computation of interest and in the determination of outstanding balances. Said deductions shall be applied first to the recoupment of the principal of said advances in the order of their advancement and then to the payment of interest accrued on the said advances. If these deductions are not made, or deductions are made of a different percentage than specified, the proper disbursing officer is hereby authorized to make such other and additional deductions from subsequent vouchers as will cause the total deductions to equal the above specified percentage. But the last deduction shall not exceed an amount equal to the balance of the said advance payments and interest then accrued. The contractor may, however, at any time, return to the Government, in cash, the entire outstanding balance of the said advance payments, with accrued interest, or any part thereof. The deductions above specified shall supersede
80 and take the place of such deductions as were specified in the said Supplemental Agreements dated Jan. 15, 1918, and Feb. 1, 1918, for the recoupment of the two prior advance payments.

If the total amount of the said advance payments with interest accrued thereon shall not be applied and credited in payment for supplies, as aforesaid, or if the contractor for any cause shall not

furnish to the Government the supplies in whole or any part thereof, as provided in the Principal Agreement, even though the Government shall terminate said Principal Agreement, or any part thereof, or if the contractor shall become insolvent, or shall commit an act of bankruptcy, or if the contractor's assets shall be placed in the hands of a receiver, the contractor shall immediately return to the Government any balance of the said advance payments and interest, after deducting:

(*a*) The total of any credits made as hereinbefore provided.

(*b*) All liquidated accounts that may be due and owing under the Principal Agreement from the Government to the contractor.

Article V. Each voucher submitted by the contractor for payment under the Principal Agreement shall bear a statement on the face thereof specifying the amount to be deducted from the gross face amount thereof, as hereinbefore provided.

Article VI. So long as any portion of the above mentioned advance payment and accrued interest shall not have been applied in payment for supplies, as herein provided, or returned to the Government, the contractor shall not, without the written consent of the War Credits Board:

(*a*) Pledge or place any lien or encumbrance on, or suffer any lien or encumbrance to be placed on, its assets or property.

(*b*) Sell or dispose of its accounts receivable.

(*c*) Pay any dividends on its capital stock.

81 Article VII. As collateral security for the performance by the contractor of this Supplemental Agreement and the return of this advance payment, and any interest accrued thereon, the contractor shall furnish to the Government on the signing of this agreement the demand note of the contractor for One Million Two Hundred Fifty Thousand Dollars ($1,250,000) of even date herewith, bearing interest at the rate of six per cent per annum and payable to the order of the Secretary of War on behalf of the United States of America at his office in Washington, D. C.

On the failure of the contractor, at any time, to comply with the terms of this agreement the Government may sell the said demand note at public or private sale, or otherwise, and at one or more sales, and with or without notice to the contractor, applying the proceeds after payment of the costs of sale toward the repayment of this advance payment, and interest accrued thereon, and accounting to the contractor for the balance, if any. The Government may become the purchaser of the said note at any such sale, free of all trusts and claims whatsoever.

Article VIII. The Government shall not negotiate nor demand payment of the note mentioned in the preceding Article so long as the contractor is not in default under this agreement, or under the Principal Agreement.

Article IX. On the complete performance by the contractor of its obligations hereunder, the Government shall return to the contractor the said collateral security referred to in the Article numbered VII hereof.

Article X. Any rights or discretion herein given to the Government may be exercised by the Secretary of War or the Contracting Officer. The existence of any default hereunder on the part of the contractor may be determined by the Secretary of War or the contracting officer, and his determination shall be final and binding on the parties. The terms "Secretary of War" and "Contracting Officer," as used herein, shall extend to and include their respective successor or successors in office, and their respective representative or representatives thereto duly authorized. The War Credits Board shall have the right, with the consent of the contractor, to
82 revise at any time the provisions of Article IV and may permit substitutions of collateral deposited under Article VII.

Article XI. The name of the Contracting Officer is F. D. Schnacke, Captain, A. S. A. P.

Article XII. Except as provided herein, the Principal Agreement and said two Supplemental Agreements are unchanged.

In witness whereof, the parties have caused these presents to be signed in their names and on their behalf by their respective representatives thereto duly authorized this 23rd day of October, 1918.

Executed in six parts.

For DUESENBERG MOTORS CORPORATION,
J. R. HARBECK,
Its President.

For THE UNITED STATES OF AMERICA,
F. D. SCHNACKE,
Capt., A. S., A. P.

DEAN LUCKING.
JOHN GRAY.

Approved Oct. 5, 1918.
WILLIAM C. POTTER,
Asst. Director of Aircraft Production.

J. G. F.

EXHIBIT "K."

Certificate of authenticity with seal of Department of the Interior.

30087-B.
30087-C.
30087-D.
30087-E.
30087-B.
30087.

83 Interior Department, Returns Office, Nov. 6, 1919. Received.

No. 1451.

Air Service,

United States Army.

This contract, made this 14th day of Aug., 1919, by and between Duesenberg Motors Corporation, a Corporation organized under the laws of New York and having an office at 120 Broadway, New York City, hereinafter called the "Contractor," party of the first part, and the United States of America, hereinafter called the "Government," represented by F. H. Vanderwerker, Second Lieutenant, A. S., A. P., United States Army, hereinafter referred to as the "Contracting Officer," acting by the authority and under the direction of the Secretary of War, party of the second part, witnesseth that:

Whereas the parties hereto did upon the dates hereinafter specified enter into certain contracts and agreements against which certain orders were issued, which contracts and orders were of the designating numbers hereinafter mentioned, to all of which and to the terms and conditions whereof reference is hereby made and which contracts and agreements and orders are herein referred to as the original contracts:

Contract No.	Date.	Order No.
2318	November 20, 1917	30087
2318-A	December 11, 1917	30087
2318-B	January 4, 1918	30087-B
2318-C	January 15, 1918	30087-C
2318-D	February 4, 1918	30087-D
2318-E	February 11, 1918	30087-E
2318-F	September 26, 1918	30087-B
2318-G	October 23, 1918	30087

and,

84 Whereas, this present agreement is supplementary to all of said aforementioned agreements and is executed for the purpose of consolidating and settling the same as though they were but one instrument; and

Whereas, the furnishing and delivery of further articles or work under the original contracts would exceed the present requirements of the Government; and

Whereas, the Contractor, pursuant to the original contract, has incurred expenses and obligations for the purpose of furnishing and delivering the articles or work remaining undelivered under said contracts and relinquishes prospective profits as provided in Article XI, clause 3, in the original contract, and

Whereas, it is in the public interest to terminate and settle said original contract and the supplements and amendments thereto as herein provided:

Now therefore, in consideration of the foregoing and of the mutual covenants and agreements herein contained, it is agreed:

Article 1.

The Contractor shall not furnish or deliver, and the Government shall not accept or pay for any further articles or work agreed to be delivered under the original contract hereinbefore mentioned, except as herein provided, and title to all special tools, raw material, work in process and all other property for which the Government has paid is and shall remain in the Government.

Article 2.

It is agreed that there shall be deducted from the original allowances for depreciation and amortization and the percentage thereon allowed under the contract as profit based upon certain costs made as aforesaid, and charged against the contractor, the sum of $350,000, which sum represents the difference between the allowance originally made on account of depreciation and amortization and percentage of profit allowed thereon upon termination, and the amount it is now agreed shall be allowed.

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Article 3.

Contractor shall pay the full sum due on war credit loans, principal and interest computed to date of payment, amounting to $182.474.97.

Article 4.

The Government will credit upon the indebtedness of the contractor the open vouchers amounting to $73,083.71, which it is understood, includes reimbursement in the amount of $2,000, paid by the contractor to Frank E. Smith one of the Appraisers, at the request of Finance Division, Air Service.

Article 5.

There shall be paid to the contractor overhead from July 1, 1919, to the date of this agreement to be determined by the accounting methods heretofore employed in the determining of the previous months' overhead but not exceeding $35,000.00 and the additional sum of $15,000.00 for use of plant for the storage of Government property.

Article 6.

There shall be credited upon the amount due the United States by reason of the revision of the figures on depreciation and amortization, to the contractor the rent upon the Fiat plant at Poughkeepsie, New York, collected and heretofore credited to the United States amounting to $25,459.80.

Article 7.

The contractor is to be given a reasonable time not to exceed ninety (90) days in which to effect final settlement and make payments to the Government of the balance found due hereunder.

86 Article 8.

It is agreed that the sums to be paid the Contractor as provided for under this agreement, shall be liquidated as follows: These sums shall be applied as a credit upon the amounts due by the Contractor to the Government through the War Credits Board amounting to date to approximately $182,000, as aforesaid, and to the extent of said amounts payable to the Contractor, the obligations of the Contractor to the Government shall be discharged and extinguished. The balance as found due from the Contractor to the Government shall be paid by the Contractor within ninety (90) days as agreed above.

Article 9.

The Government will and it does hereby assume and agree to pay such an amount as may eventually be determined to be due the La Pointe Machine and Tool Company of Hudson, Mass., upon commitment in connection with the performance of said contract. The Contractor is and has been prepared to pay this claim up to the sum approximately $908.00 which is the amount demanded by the said La Pointe Machine and Tool Company, but said Company having refused to permit the Government's Auditor to examine its books in connection with this claim the Government has requested the Contractor to assign the claim to the Government, and the Government does hereby agree to save and hold the Contractor harmless from any loss, claim, demand or damage that may accrue to or against it growing out of the assertion of its rights against the said Contractor by said La Pointe Machine & Tool Company, and to defend for the said Contractor and without cost to the Contractor any action that may be brought against it by said La Pointe Machine & Tool Company growing out of the original contracts hereinbefore mentioned. The Contractor agrees that it will upon demand at any time, without cost, furnish the Government with all reasonable assistance and with all evidentiary documents and
87 data, which it now has or may in the future obtain, relevant to the defence of such claim.

Article 10.

The Contractor does hereby for itself, its successors and assigns, remise, release and forever discharge the Government of and from all and all manner of debts, dues, sum or sums of money, accounts, reckonings, claims or demands whatsoever due or to become due in law or in equity under or by reason of or arising out of said original

contracts or any of them, and from all and all manner of claims, rights or demands whatsoever, with the following exceptions:

1. Claim for interest for money borrowed by the Contractor for the execution of the Contract and used in the Contract. The Contractor asserts such claim should be allowed which is denied by the Government. The question to be submitted by the War Department Claims Board to the Comptroller with a statement of the facts and request for opinion. If the decision of the Comptroller is unfavorable to the Contractor he may prosecute such claim in any court of competent jurisdiction. If such decision be unfavorable to the Government the Government in its discretion may decline to follow it, in which event the remedy to the Contractor shall be by suit as aforesaid.

2. Claim asserted by the Contractor for disbursement of certain expenditures made before said contract was executed, alleged to have been disbursements made in connection with its commercial business, the Contractor having terminated said business to accept the contract to manufacture Liberty motors for the Government, by which termination of its commercial work the Contractor alleges he suffered a loss to the amount of such disbursements. The Contractor reserves the right to sue therefore in any court of competent jurisdiction. The Government denies the validity of any such claim and reserves the right to make any defense thereto arising under the provisions of said original contract or any contract supplemental thereto, or otherwise.

88 3. Claim asserted by the Contractor, arising out of the cancellation of the provisions for the production of Liberty Motors and substitution therefor of provisions for the production of Bugatti Motors and delay in production thereof, asserted by Contractor to be due to the Bugatti Motors not being ready for production. The Contractor reserves the right to prosecute such claims in any court of competent jurisdiction. The Government denies the validity of any such claim and reserves the right to make any proper defense thereto.

4. It is understood concurrently with the payment by the Contractor to the Government of the balance to the Government as set forth herein the notes held as collateral and the unrecorded deed of the Poughkeepsie Plant shall be delivered to the Contractor.

Article XI.

This agreement shall not become a valid and binding obligation of the Government unless and until the approval of the Claims Board of the Air Service has been noted at the end of this instrument.

In witness whereof the parties hereto have caused this instrument to be executed by their respective representatives thereunto duly authorized, the day and year first above written.

DUESENBERG MOTORS CORPORATION,
By E. P. DECKER.
UNITED STATES OF AMERICA,
By F. H. VANDERWERKER,
2 Lt., A. S., A. P.

Witnesses:
CAROLYN M. KIRBY.

This is to certify that the foregoing contract has, this 19th day of August, 1919, been duly approved by the Claims Board of the Air Service.

R. M. DURHAM,
2nd Lt., A. S., A. P.,
Recorder, Claims Board, Air Service.

89

War Department,

Air Service.

Office of the Director.

Washington, D. C., August 19, 1919.

Memorandum for the Air Service Claims Board.

Subject: Proposed Termination Contract with the Duesenberg Motors Corporation.

1. The termination contract dated August 14, 1919, submitted by the War Department Claims Board proposes as follows:

2. That there shall be deducted from the original allowance for depreciation the sum of $350,000.00 to be charged against the contractor. The original allowance for depreciation according to the statement of W. E. Butler of the Liquidation Contracts Auditing

was	$1,414,520.34
after deducting	350,000.00
the depreciation allowed would be	$1,064,520.34
The total cost of increased facilities is	1,303,571.63
The total cost of normal facilities	802,585.98
The total cost of increased and normal facilities is	$2,106,157.61

The original allowance for depreciation was 67% of the total cost of facilities. The proposed allowance is 50% of the total cost of facilities.

3. It is proposed that the contractor shall pay the amount due on war credit loans in the sum of $182,171.97. This sum is reported as the correct amount by Captain Pettus, Disbursing Officer.

4. It is proposed that there shall be credited on the indebtedness of the contractor certain open vouchers amounting to $73,083.71.
90 Mr. Butler reports that this amount consists of vouchers not yet certified for payments as follows:

For executive salaries for May and June, 1919.....	$8,626.26
Overhead	33,552.07
Commitments	21,091.45
And vouchers certified for payment in the sum of.....	9,813.93

Mr. Butler raises a question concerning the payment of salaries for May and June, 1919. In view of the fact that the company was kept out of production during those months by the act of the United States, these items would appear to be legitimate overhead charges. The total amount suggested in the contract should be allowed.

5. It is proposed to pay the contractor overhead from July 1, 1919, until the date of the agreement, not to exceed $35,000.00. For the same reason as stated in the foregoing paragraph this is a legitimate charge.

6. It is proposed to pay the contractor $15,000.00 for the use of the plant for storage. The Government has had the use of the plant for storage since January, 1919. Figured on the value of the plant after making allowance for depreciation the sum stated would amount to rent for about seven weeks on a basis of 6% per annum. The amount suggested should be allowed.

7. It is proposed to credit to the contractor rent of the Fiat Plant in the sum of $25,459.80. At the time of the payment of the last depreciation voucher No. 214, this sum was deducted from the voucher. The Fiat Plant was owned by the contractor who had rented it to a third party. The contractor had collected the rent from the tenant. The Government had no right to charge them with rent so collected. The proposition to restore this rent to them is proper.

8. Articles 7 and 8 of the proposed contract provide a method of making financial adjustments.

9. Article 9 provides for the assumption by the Govern-
91 ment of liability to the La Pointe Machine and Tool Company in a sum of approximately $908.00. Some amount is due this latter company from the contractor and the only question is concerning the verification of the amount by audit of their books.

10. Article 10 of the contract constitutes a release and satisfaction to the Government of all claims with certain definite exceptions concerning which the contractor reserves the right to further prosecute

the same in courts of competent jurisdiction. The nature of these claims is such that it is altogether improbable that any court will allow them.

11. It is recommended, therefore, that the contract as proposed by the War Claims Board be approved by the Air Service Claims Board.

WARREN E. GREENE,
Lt. Colonel, J. A.

92 II. *Defendant's Demurrer to Petition.*

(Filed September 3, 1920.)

The United States by the Attorney General demurs to the petition filed herein on July 6, 1920, and to each count thereof, that is to say:

(1) To the claim for interest and revenue stamps, stated in paragraph XX of the petition and mentioned in paragraph XVII thereof, item 1, amounting to $152,808.93.

(2) To the claim for $238,261.26 alleged to represent losses to plaintiff in connection with its commercial business by reason of the making of the original contract with the Government, dated November 20, 1917 (Ex. A).

(3) To the demand for an unliquidated amount for alleged delay in the production of the Bugatti motors.

This demurrer is interposed to each of the aforementioned alleged causes of action, separately, on the ground that none of
93 them states facts sufficient in law to constitute a cause of action.

FRANK DAVIS, JR.,
Assistant Attorney General.

J. ROBERT ANDERSON,
CROWLEY WENTWORTH,
Special Assistants to the Attorney General.

94 III. *Argument and Submission of Demurrer to Petition.*

This case was argued in favor of the demurrer by Crowley Wentworth and J. Robert Anderson and in opposition thereto by George A. King, and submitted January 7, 1921.

IV. *Judgment of the Court Dismissing Petition.*

(Filed February 21, 1921.)

No. 34655.

DUESENBERG MOTORS CORPORATION

v.

THE UNITED STATES.

Upon due consideration of the premises it is ordered with an opinion by Judge Hay that the defendant's demurrer be and it hereby is sustained and that the plaintiff's petition herein be and the same is hereby dismissed.

95 V. *Opinion of the Court.*

(Decided February 21, 1921.)

HAY, *Judge*, delivered the opinion of the court:

This is a suit brought by the Duesenberg Motors Corporation against the United States for $1,201,851.96. The defendant has demurred to the petition of the plaintiff.

The facts stated in the petition are as follows:

The plaintiff is a corporation organized and existing under the laws of the State of New York. The plaintiff, on November 20, 1917, entered into a contract with the United States for the production of 500 Liberty aircraft engines or motors and their spare parts. It was stated in the contract that said engines were to be "in accordance with the drawings and specifications attached hereto," but no such drawings or specifications were annexed to the contract. The contract is set out in full, and annexed to the petition as Exhibit A.

At the time of entering into said contract the plaintiff was engaged in producing internal-combustion engines and had large commercial contracts, and had at that time an unabsorbed investment of $238,261.26 in said commercial contracts; and by reason of the contract aforesaid it was necessary for the plaintiff to discontinue all of said commercial contracts, and this resulted in the loss to the plaintiff of all said commercial contracts.

The contractor, by said contract, agreed to deliver the 500 engines according to the following schedule: Ten in February, 1918; 50 in March; 125 in April; 165 in May; and 150 in June, 1918; payment to be made of all cost, as defined in the contract, of the production of said engines and of an additional sum of $913.05 as a fixed profit on each engine delivered and accepted.

On December 11, 1917, the plaintiff entered into a supplemental agreement with the United States, a copy of which is filed with the petition and marked "Exhibit B," whereby the fixed profit was changed from $913.05 to $625 for each engine, and the amount of

estimated cost of production was changed from $6,087 to $5,000, and whereby it was agreed that the United States should place with the plaintiff company an additional order for 500 additional engines.

On December 24, 1917, the plaintiff was notified in writing by the United States to stop work on the engines called for in its
96 contract, as it was desired to substitute at least an equal number of engines of a different type; and on January 4, 1918, the plaintiff entered into a further supplemental agreement with the United States (marked Exhibit C and filed with the petition), whereby it was provided that the plaintiff should make for the United States 2,000 Bugatti motors and such spare parts for said motors as the United States might order from time to time in accordance with the specifications to follow. The amount of fixed profit for each article was to be $750 instead of $625, and the estimated cost was changed from $5,000 to $6,000. The articles were to be delivered in numbers fixed in the contract from March, 1918, to September, 1918.

On January 15, 1918, the plaintiff entered into a further supplemental agreement with the United States (marked "Exhibit D" and filed with the petition), whereby the United States agreed to advance to the plaintiff an amount not exceeding $250,000, which the contractor was to repay to the United States with interest at the rate of 5 per cent per annum.

On February 11, 1918, the plaintiff entered into a further agreement with the United States (marked "Exhibit E" and filed with the petition) making further provisions for an advance by the United States to the plaintiff of the sum of $400,000, with interest at the rate of 6 per cent per annum.

On February 14, 1918, the plaintiff entered into a further supplemental agreement with the United States (marked "Exhibit F" and filed with the petition) relating to the purchase of the plant of the F. I. A. T. corporation for the sum of $400,000.

On October 23, 1918, the plaintiff entered into a further supplemental agreement with the United States (marked "Exhibit I" and filed with the petition), whereby the United States agreed to make a further advance of $1,250,000 to the plaintiff, which the plaintiff agreed to repay with interest at the rate of 6 per cent per annum.

On September 25, 1918, the United States gave the plaintiff a production release, and on October 4, 1918, the plaintiff had produced three Bugatti motors.

Active hostilities between the United States and Germany were suspended by the armistice of November 11, 1918, and the plaintiff was notified that the United States desired and would take only 40 Bugatti motors of those contracted for, and the United States in accordance with the terms of the contract canceled the same, the contract having provided that if, in the opinion of the Chief Signal Officer of the United States Army the public interests required it, the contract might be terminated by 30 days' notice in writing to the contractor.

After the termination of the contract a supplemental agreement of settlement was made and entered into on August 14, 1919 (a copy

of which marked "Exhibit K" is filed with the petition). By said agreement a full settlement was made between the parties, except that the plaintiff reserved the right to prosecute in any court of competent jurisdiction (1) a claim for interest for money borrowed by the contractor for the execution of the contract and used in the contract; (2) a claim asserted by the contractor for disbursement of certain expenditures made in connection with its commercial business by the termination of which the plaintiff claimed to have suffered a loss to the amount of such disbursements; and (3) a claim asserted by the contractor arising out of the cancellation of the provisions for the production of Liberty motors and substitution therefor of provisions for the production of Bugatti motors, and delay in production thereof, asserted by the contractor to be due to the Bugatti motors not being ready for production.

The plaintiff in this suit claims that there is due it the sum of $1,201,851.96, which sum is ascertained as follows: Fixed profit for each motor, $750; fixed profit on 2,000 motors, $1,500,000, which last sum is to be credited by the fixed profit on 10 motors, and other items amounting to the sum of $298,148.04.

The plaintiff claims as a part of its expenses in performing the original and supplemental contracts the following sum for interest and revenue stamps, $152,808.93. The plaintiff also claims the sum of $238,261.26, which it claims it had as an unabsorbed investment in its commercial business at the time of entering into the original contract with the United States, and which it claims is a total loss by reason of that contract and the supplemental agreements. The two claims above mentioned are claimed by the plaintiff as alternative to the amount of $1,201,851.96, the first claim reserved in the contract of settlement.

The facts set forth in the petition show the relations of the parties to be those of contractors. Although section 120 of the act of June 3, 1916 (commonly known as the national defense act), is cited in the contract and seems in some way to be relied upon in the plaintiff's brief, the provisions of that section have nothing to do with contracts between persons and the United States. That section reads as follows:

"Sec. 120. The President, in time of war, or when war is imminent, is empowered, through the head of any department of the Government, in addition to the present authorized methods of purchase or procurement, to place an order with any individual, firm, association, company, corporation, or organized manufacturing industry for such product or material as may be required, and which is of the nature and kind usually produced or capable of being produced by such individual, firm, company, association, corporation, or organized manufacturing industry.

"Compliance with all such orders for products or material shall be obligatory on any individual, firm, association, company, corporation, or organized manufacturing industry or the responsible head or heads thereof and shall take precedence over all other orders and contracts theretofore placed with such individual, firm, company, association, corporation, or organized manufacturing industry, and any

individual, firm, association, company, corporation, or organized manufacturing industry or the responsible head or heads thereof owning or operating any plant equipped for the manufacture of arms or ammunition, or parts of ammunition, or any necessary supplies or equipment for the Army, and any individual, firm, association, company, corporation, or organized manufacturing industry or the responsible head or heads thereof owning or operating any manufacturing plant, which, in the opinion of the Secretary of War, shall be capable of being readily transformed into a plant for the manufacture of arms or ammunition, or parts thereof, or other
98 necessary supplies or equipment, who shall refuse to give to the United States such preference in the matter of the execution of orders, or who shall refuse to manufacture the kind, quantity, or quality of arms or ammunition, or the parts thereof, or any necessary supplies or equipment, as ordered by the Secretary of War, or who shall refuse to furnish such arms, ammunitions, or parts of ammunition, or other supplies or equipment at a reasonable price as determined by the Secretary of War, then, and in either such case, the President, through the head of any department of the Government, in addition to the present authorized methods of purchase or procurement herein provided for is hereby authorized to take immediate possession of any such plant or plants, and through the Ordnance Department of the United States Army, the manufacture therein in time of war, or when war shall be imminent, such product or material as may be required, and any individual, firm, company, association, or corporation, or organized manufacturing industry, or the responsible head or heads thereof, failing to comply with the provisions of this section shall be deemed guilty of a felony, and upon conviction shall be punished by imprisonment for not more than three years and by a fine not exceeding $50,000.

"The compensation to be paid to any individual, firm, company, association, corporation, or organized manufacturing industry for its products or material, or as rental for use of any manufacturing plant while used by the United States, shall be fair and just."

In this case the procedure contemplated by that section was not followed, but the plaintiff voluntarily entered into a contract with the United States whereby it was to derive a large profit, which was set out in the contract and agreed upon by the parties. The recital in the contract that "the President hereby places the following order with the contractor with the requirement that it comply with the contract hereinafter set forth," does not alter the fact that the contract was a voluntary one. The contractor knew, or ought to have known, that it was not in the power of the United States to compel it to enter into a contract, and that the provisions of the act cited in the contract did not confer any such power. Therefore the court in passing upon the issues presented in this case will consider the rights of the parties as being those of contractors.

The first claim to be considered is that for the recovery of the plaintiff of the sum of $1,201,851.96, that being the amount of the fixed profit which the plaintiff would have received had the contract

been fully performed. The claim is that the contract would have been fully performed by the plaintiff before the date of the armistice had not the United States delayed in furnishing specifications to the plaintiff, and that that delay was a breach of the contract which entitles the plaintiff to the damages claimed. The real basis of the claim of the plaintiff is the termination of the contract by the United States. Had not the contract been terminated the plaintiff would have completed it, and would have earned and received the fixed profit provided for in the contract. The contract provided for its termination. The United States terminated it strictly in accordance with the terms of the contract. The provision of the contract for its termination also provides what payments are to be made in that event. One of the payments specifically provided for
99 was: "(1) On each finished article accepted the sum provided as a fixed profit by Article IV, item (2) hereof." Under the contract, therefore, no more could be paid unless it is established that the United States by their act or acts prevented the plaintiff from performing the contract during its progress. No such allegation is made in the petition, for it appears that the parties mutually agreed to the delays now complained of. The very nature of the contract was such that changes in the specifications, and the delays incident thereto, were contemplated when the contract was entered into. The plaintiff took the risk of these changes and delays along with the risk that the contract might be terminated before the articles contracted for were completed. Having taken that risk the plaintiff can not now complain of the consequences, which it must have foreseen or contemplated the possibility of when it made the contract.

The contract expressly provided that the plaintiff should pay interest on the sums of money advanced it by the United States. There is nowhere in the contract any qualification of this provision, and it is not perceived how this court can relieve the plaintiff of its obligation.

The claim for $238,261.26, which the plaintiff alleges was a total loss to it by reason of its having to give up commercial contracts in that amount, which it had on hand when it entered into the contract with the United States, is not tenable. The plaintiff voluntarily entered into the contract with the United States with full knowledge that its commercial contracts must be abandoned, and it was willing to do this and lose these commercial contracts in view of the large profits which it expected to receive under its contract with the United States. In the contract made with the United States a basis of payment was agreed upon. No loss which the plaintiff might have incurred from giving up its commercial contracts was provided for or contemplated.

For the foregoing reasons the demurrer of the United States to the petition of the plaintiff is sustained. The petition of the plaintiff will be dismissed and it is so ordered.

Graham Judge; Downey, Judge; Booth, Judge; and Campbell, Chief Justice, concur.

100 VI. *Application for and Order Allowing Appeal.*

(Filed April 18, 1921.)

In the Court of Claims.

No. 34655.

DUESENBERG MOTORS CORPORATION

v.

THE UNITED STATES.

From the judgment dismissing the petition in the above-entitled cause, dated February 21, 1921, the claimant, Duesenberg Motors Corporation, hereby makes application for and gives notice of an appeal to the Supreme Court of the United States.

KING & KING,
Attorneys for Claimant.

Ordered: That the above appeal be allowed as prayed for.

By THE COURT.

April 18, 1921.

101 VII. *Clerk's Certificate.*

In the Court of Claims.

No. 34655.

DUESENBERG MOTORS CORPORATION

v.

THE UNITED STATES.

I, F. C. Kleinschmidt, assistant Clerk, Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the demurrer, the argument and submission of the case on demurrer; order sustaining demurrer; of the opinion of the court, and application for and allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this 6th day of May, 1921.

[Seal of Court of Claims.]

F. C. KLEINSCHMIDT,
Assistant Clerk U. S. Court of Claims.

Endorsed on cover: File No. 28263. Court of Claims. Term No. 318. Duesenberg Motors Corporation, appellant, vs. The United States. Filed May 9th, 1921. File No. 28263.

Supreme Court of the United States

October Term, 1922.

No. 80.

DUESENBERG MOTORS CORPORATION, *Appellant*,
v.
THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

Brief for Appellant.

GEORGE A. KING,
WILLIAM B. KING,
GEORGE R. SHIELDS,
Attorneys for Appellant.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1922.

DUESENBERG MOTORS CORPORATION,
Appellant,
v.
THE UNITED STATES.

No. 80.

Appeal from the Court of Claims.

BRIEF FOR APPELLANT.

I. STATEMENT OF CASE.

This is a claim for a breach of contract by the government in delaying the contractor in performance. The demurrer of the United States, rec. p. 66, was sustained, p. 67, and the petition dismissed. The opinion of the court is pp. 67-71.

Contract.

Contract was made November 20, 1917, pp. 9-31, between the United States and the Duesenberg Motors Corporation for 500 Liberty engines. Alterations of appellant's plant to permit this contract were at once begun but actual construction was not commenced because the government did not furnish specifications, petition, par. IV, p. 2.

December 11, 1917, a modified contract was made, p. 33, increasing the number to be delivered.

December 24, 1917, contractor was notified to stop work, par. VII, pp. 3, 4.

January 4, 1918, a new contract was made, rec. p. 35, for the production of 2,000 Bugatti motors and their separate parts, rec. p. 36, in lieu of the Liberty engines, pp. 53-54. This is the contract upon which the suit is based. Deliveries were to be made according to the following schedule:

"Article II.

"That, subject to all the conditions of Article III in said contract No. 2318 contained, the Contractor agrees to deliver said articles according to the following schedule:

"1918.	March	10
	April	50
	May	150
	June	400
	July	500
	August	500
	September	390
	Total	2,000"

It was a "cost-plus" contract, whereby the contractor was to receive cost, Article IV-VII, pp. 13-18, and a fixed profit of $750 for each motor delivered, Article III, p. 37.

The provisions of the original contract of November 20, 1917, except as modified herein, were made a part of this contract, Article VII, p. 38.

Later supplemental agreements of January 15, 1918,

p. 40, February 11, 1918, p. 42, and October 23, 1918, p. 55, provided for advances by the government to the contractor of $1,250,000, with interest at five per cent, $400,000, with interest at six per cent, and $1,250,000, with interest at seven per cent. These agreements were made under authority of the act of October 6, 1917, Chapter 79, 40 Stat. 383.

A number of provisions in the contract show the extreme importance of promptness. Article II, p. 10, opens:

"Time being of the essence of this contract, the contractor agrees to provide with the utmost dispatch, at the best prices obtainable:"

Article III, p. 12, of the original contract, after citing the original schedule, says:

"* * * inasmuch as speed of production is vital to the best interests of the Government and the People of the United States, the Contractor agrees that it will, if possible, and if requested to do so by the Contracting Officer, anticipate the foregoing schedule, and agrees to give the performance of this contract precedence over all other work for parties other than the Government."

The next paragraph expresses the contractor's obligation of "continuing performance with the utmost dispatch."

Article X, p. 20, makes the unusual provision that production and acceptance shall continue notwithstanding any discussion of changes "and shall not be interrupted thereby pending the final decision."

The formal order accompanying both the original contract and that of January 4, 1918, says that "early shipment is urgent", pp. 33, 39.

The supplemental agreements of January 15, February 11 and October 23, 1918, Article II, pp. 40, 42, 56, state that the proposed loan is "in order to expedite the delivery of the said supplies."

Specifications.

The agreement of January 4, 1918, Article I, p. 36, says that the contractor shall make "two thousand (2,000) Bugatti motors, and such spare parts for said motors as the Government may order from time to time during the period of the construction of said motors, in accordance with specifications to follow."

The petition, par. XI, p. 5, alleges that the above provision for "specifications to follow" and the provisions requiring complete delivery in March, 1918, were based upon a belief of the United States officers "that there were in existence complete specifications of the same which needed only to be obtained from France; that said Bugatti Motor had passed its experimental stage and was ready for production; and the statements in said contract operated as a representation to the claimant company that such was the fact and that production in quantity could begin at or shortly after the entry into said supplemental agreement of January 4, 1918."

The following allegations are then made, p. 5:

"When the first Bugatti engine was received in this country, shortly after the date of said supplemental agreement, it developed that extensive changes would be necessary. * * *

"An expert member of the engineering force of the Signal Corps of the United States Army was put in special charge, with instructions to make, as promptly as possible, such changes as were necessary for the production of the engine.

"The officers and experts of the claimant company diligently co-operated with the officers and experts of the Signal Corps of the Army in charge of production under this contract;

"but such extensive changes were necessary that no complete specifications were furnished to the claimant by the officers of the United States at any time prior to the 25th day of September, 1918, when the entire time allowed by the schedule of production of said supplemental agreement was within a few days of expiring;"

The result of these conditions is summarized by the allegation, p. 5:

"whereby it became impossible for the claimant, on account of the failure of the United States to furnish the required specifications, to produce any of the articles required by the contract within the time limit of the contract."

Par. XIX, p. 7, of the petition makes a similar allegation:

"The claimant now claims damages for the delay in the production of the Bugatti Motors, which delay was due to the fact that, without fault of the contractor, the specifications for the same were not furnished by the United States as provided in the supplemental agreement of January 4, 1918."

This is the breach of contract relied upon as the basis of the claim for damages. The items of claim are stated, *post*, p. 12.

While the demurrer admits the facts as stated to be true, it is deemed proper to append, as a matter of history of which the Court will take judicial notice, a statement about this contract from the official publication of the

War Department entitled "America's Munitions, 1917-1918, strictly according with the allegations of the petition. See Appendix A, *post*, p. 29. As to such publications, see *Romero* v. *United States*, 1 Wall. 721; *Jones* v. *United States*, 137 U. S. 202, 216, 217; *Knight* v. *U. S. Land Association*, 142 U. S. 161, 169; *Caha* v. *United States*, 152 U. S. 211, 222; *New York Indians* v. *United States*, 170 U. S. 1, 32.

Termination.

The armistice intervened and the government terminated the contract, as permitted by Article XI, p. 20, upon delivery of 40 motors, par. XV, p. 6. An agreement of settlement was made August 14, 1919, par. XVI, p. 6, as set forth in Exhibit K, pp. 59-64. This reserved the right to prosecute the three items of claim here made in any court of competent jurisdiction. See petition, pars. XVII-XXI, pp. 7-9; Exhibit K, Article 10, pars. 2, 3, p. 63. These are as follows:

1. Claim for interest on money borrowed for use in executing the contract. See *post*, p. 22.

2. Claim for losses on commercial business terminated to accept this contract. See *post*, p. 25.

3. Claim for delay in production of Bugatti motors, due to their not being ready for production. See *post*, p. 19.

It is not claimed that the termination was a breach of contract; the breach was in the delay in furnishing the specifications prior to the termination. This delay was due to the motors not being ready for production.

II. ASSIGNMENT OF ERROR.

Appellant says that the Court of Claims made the following errors:

1. In holding that the claimant was not entitled to receive the fixed profit upon motors which it would have delivered but for the failure of the United States to furnish specifications within a time to permit deliveries within the time fixed by the contract.

2. In holding that the United States could charge the claimant with interest during a period in which the United States was delaying the work by its failure to furnish specifications.

3. In holding that the loss of the company on its commercial contracts in process preceding this contract was not properly chargeable to the United States on account of the default of the United States.

4. In sustaining the demurrer and dismissing the claimant's petition.

III. ARGUMENT.

Reservations in Settlement.

As to the right to make contracts of settlement, see *United States* v. *Corliss Steam Engine Co.*, 91 U. S. 321. As to the validity of reservations in contracts of settlement, see *Cramp Co.* v. *United States*, 216 U. S. 494; *Pneumatic Gun Carriage Co.* v. *United States*, 36 C. Cls. 71; *Noel Construction Co.* v. *United States*, 50 C. Cls. 98; *Peirce* v. *United States*, 50 C. Cls. 371.

Breach of Contract.

Appellant's position is:

(1) The contract made time of the essence of the contract and required deliveries to begin in March and

end in September, 1918, Article II, p. 36, and held the contractor to the most rigid rule of promptness.

(2) This provision necessarily implied that the United States must do everything required of the government in time to permit the contractor to comply with its obligations.

(3) The contract provision, Article I, p. 36, for "specifications to follow", necessarily implied that the specifications must be furnished in time to permit the deliveries to be made on time.

(4) The failure to furnish specifications in such time, —they were not complete until September 25, 1918,— was a breach of contract by the United States which entitles the contractor to recover for the losses caused thereby.

These propositions rest upon elementary principles:

(a) "What is implied is as effectual as what is expressed," *Shrewsbury* v. *United States*, 18 Wall. 664; *Equitable Insurance Co.* v. *Hearne*, 20 Wall. 494, 496; *United States* v. *Babbitt*, 1 Black 55, 61; *Black* v. *Woodrow*, 39 Md. 194; *Burt* v. *Stringfellow*, 45 Utah, 207.

(b) "Specifications to follow" implies within a reasonable time, but this means a reasonable time within the intent of this contract, when its parts are construed together. The schedule of deliveries, beginning in March, 1918, Article II, p. 36, shows that intent, as do the many expressions of the need of promptness quoted, *ante*, p.—. Delay in furnishing specifications until the closing days of the last month of deliveries fixed by the schedule was obviously a violation of the obligation to furnish specifications within a reasonable time. The reasonable time for delivering specifications of articles to be delivered in March, 1918, is a sufficient time before this date to permit manufacture and delivery by this date.

(c) Upon breach of contract by one party, the other may continue work without waiver of its right to damages. This was recently declared by this Court in *American Smelting & Refining Co.* v. *United States,* May 15, 1922, 257 U. S. —, as follows:

"Its claim if any must be for damages on the ground that the United States did not perform its part of the contract on time. Such a claim is not necessarily waived by completing performance. *St. Louis Hay & Grain Co.* v. *United States,* 191 U. S. 159, 164."

See also *Mansfield* v. *N. Y. Central R.R.,* 102 N. Y. 205, 210, quoted, *post,* p. 32; *McMaster* v. *State,* 108 N. Y. 542, 553; *Tobey* v. *Price,* 75 Ill. 645; *Merrimack Mfg. Co.* v. *Quintard,* 107 Mass. 127; *Garfield &c Co.* v. *Fitchburg R.R.,* 166 Mass. 119.

The principle is of special application to a war contract where refusal to continue would have resulted in confusion in the government's plans. The rule of law should conform to the obligation of patriotism.

(d) It is true that Article III, p. 12, of the original contract says:

"In view of the present uncertain factors inherent in the articles, and in the establishment of the industry of producing them, it is understood that this schedule may require revision, * * *."

Article II, p. 36, of the contract of January 4, 1918, makes the new schedule "subject to all the conditions of Article III" of the original contract. There was no revision of the schedule of the later contract, p. 36. The obligation of the government to furnish specifications in time to enable the contractor to meet this schedule

could only be changed by a revision of the schedule and that could only be made as permitted by Article X, p. 19, discussed, *post*, p. 17.

The provision of Article 5, p. 34, of the first supplemental agreement, providing that the schedule of deliveries for the second 500 Liberty motors should be agreed upon before February 1, 1918, marks the importance of the schedule as a factor in the contract.

The meaning and importance of specifications and the effect of failure to furnish them have been the subject of many judicial decisions. These are reviewed in Appendix B, *post*, p. 30.

Defense.

All the items of the claim rest on the above fundamental propositions. The Court of Claims, opinion, p. 71, answers:

"Under the contract, therefore, no more could be paid unless it is established that the United States by their act or acts prevented the plaintiff from performing the contract during its progress. No such allegation is made in the petition, for it appears that the parties mutually agreed to the delays now complained of. The very nature of the contract was such that changes in the specifications, and the delays incident thereto, were contemplated when the contract was entered into. The plaintiff took the risk of these changes and delays along with the risk that the contract might be terminated before the articles contracted for were completed. Having taken that risk the plaintiff can not now complain of the consequences, which it must have foreseen or contemplated the possibility of when it made the contract."

The first sentence needs amendment by substituting "default" for "act or acts", because the United States

might prevent performance and thus incur liability to the contractor as well by non-feasance as by malfeasance. The second sentence is in error because an allegation of non-performance of the obligation to furnish specifications in proper time is made in the petition, par. XI, p. 5, as herein fully quoted, *ante*, pp. 10, 11.

The remainder of the argument is that the parties agreed that changes might be made in the specifications, that delays are incident to change, that the parties therefore impliedly agreed to such delays and consequently that they equally agreed to delays arising from failure to furnish specifications at all.

The provision of the contract authorizing changes is contained in Article X, p. 19, of the contract of November 20, 1917, as follows:

"No changes shall be made in the drawings or specifications attached hereto and made a part of this contract, except as provided in this Article."

Provision is then made for change (a) by mutual agreement and (b) by order from the United States after a hearing given to the contractor.

It is submitted that the argument of the Court of Claims is fallacious for the following reasons:

(1) The parties never agreed to failure to furnish specifications or to delay in furnishing them. This is a different thing from furnishing specifications and then making changes.

(2) The contract provision for changes strictly limits the manner of authorizing changes. No rights can be predicated on this article except for changes made as there provided. This obviously does not include a failure to furnish specifications.

(3) The changes permitted under any such provision are changes of detail which do not essentially alter the nature of the article to be furnished. Such changes would not interfere with the general processes of production but only with its details and would thus not operate as a complete suspension of the work. Failure to furnish specifications suspends progress to the total extent of their absence. The above rule as to the extent of changes is laid down in *McMaster* v. *State,* 108 N. Y. 542, 551, as follows:

"It is difficult, probably impossible, to draw in advance a precise line between what is authorized by such reservation and what is not. It authorizes such changes as frequently occur in the process of constructing buildings, in matters of taste, arrangements and details; but it does not authorize a change in the general character of the building. If it does, a contract carefully entered into could be mainly if not entirely frustrated."

See to the same effect *Salt Lake City* v. *Smith,* 104 Fed. 457, 466 (C.C.A.); *Cook Co.* v. *Harms,* 108 Ill. 151, 158, 159; *Cleveland R.R. Co.* v. *Moore,* 170 Ind. 328. It was applied to a case of suretyship in *United States* v. *Freel,* 186 U.S. 309, 317, affirming 92 Fed. 299; 99 Fed. 237, and illustrated in *Henderson Bridge Co.* v. *McGrath,* 134 U.S. 260, 273.

(4) The contract of November 20, 1917, provided in Article I, p. 10, for delivery of 500 Liberty engines in accordance with the attached specifications, "including all authorized changes thereof." The contract of January 4, 1918, Article I, p. 36, provides for delivery of 2,000 Bugatti motors, "in accordance with specifications to follow," and says nothing about changes. It is open to question whether the omission from the later contract of

the provision for "authorized changes" just quoted from the earlier contract did not have the effect of dropping entirely from the later contract the provisions of Article X, p. 19, of the earlier contract providing the manner in which such authorized changes should be made. See Article VII, p. 38, of the later contract.

For these reasons it is insisted that appellant is entitled to claim damages for the delays caused by the failure of the United States to furnish specifications.

Failure to furnish specifications has repeatedly been held to be a basis for a claim for damages, as shown in the authorities fully reviewed in Appendix B, *post*, p. 30.

Wrongful suspension of a contract is equally a basis for damages as wrongful termination, *United States* v. *Smith*, 94 U. S. 214. See *Cotton* v. *United States*, 38 C.Cls. 536; *Houston Construction Co.* v. *United States*, 38 C.Cls. 724; *Moore* v. *United States*, 46 C.Cls. 139; *Rodgers* v. *United States*, 48 C.Cls. 443.

Items of Claim.

Profits Lost by Delay.

This is the third item reserved in the contract of settlement, Article 10, par. 3, p. 63, and alleged in the petition, par. XVII, p. 7. It is the first item claimed, par. XIX, pp. 7-8, and logically needs first consideration. The reservation is as follows:

"3. Claim asserted by the Contractor, arising out of the cancellation of the provisions for the production of Liberty Bugatti Motors and delay in production thereof, asserted by Contractor to be due to the Bugatti Motors not being ready for production. The Contractor reserves the right to prosecute such claims in any court of

competent jurisdiction. The Government denies the validity of any such claim and reserves the right to make any proper defense thereto."

The contract, Article II, p. 36, *ante*, p. 8, provides for deliveries between March and September, 1918, of the whole 2,000 motors. It grants, Article III, p. 37, a fixed profit of $750 for each motor. Complete specifications were not furnished by the United States officers and a release given by them for production until September 25, 1918, pars. XI, XII, pp. 5, 6. The armistice resulted in the government taking only 40 motors, par. XV, p. 6. Upon these the fixed profit was paid, par. XIX, p. 8, amounting to $30,000. This paragraph says, p. 8:

"If said specifications had been promptly furnished the claimant would have produced all of said Bugatti Motors within the time specified in said supplemental agreement and would have earned the seven hundred fifty dollars ($750.00) fixed profit provided for each motor, amounting, for the two thousand motors, to one million five hundred thousand dollars ($1,500,000.00)."

Profits were also to be earned on the manufacture of spare parts, Article V, p. 37, and upon savings made in manufacture, Article IV, p. 37; Article VI, pars. 7, 7a, pp. 15-16. The uncertainty of what would have been earned on these items is such that no claim under them is asserted.

Credit is given upon the above amount not only for the fixed profit allowed on the completed motors, but for that allowed on material in process, a total of $298,148.04, leaving a net claim of $1,201,851.96, par. XIX, p. 8.

Upon this state of facts, admitted by the demurrer, the loss of the profit which the contractor would have made before the date of termination is the measure of damages for the delay which caused the loss. It is not here claimed as a loss due to the termination of the contract, but as a loss due to the delay which prevented completion before termination. It is claimed under the definition of actual damages stated in *Philadelphia, W. & B. R.R. Co.* v. *Howard*, 13 How. 307, 344:

"Actual damages clearly include the direct and actual loss which the plaintiff sustains *propter rem ipsam non habitam.*"

The same principle is stated in *St. Louis Beef Co.* v. *Casualty Co.*, 201 U. S. 173, 181, as follows:

"In general, when one party by his fault prevents the other party to a contract from entitling himself to a benefit under it according to its terms, the former is liable for the value of that benefit less the value or cost of what the plaintiff would have had to do to get it."

In *United States* v. *Behan*, 110 U.S. 338, the court said, p. 344:

"The *prima facie* measure of damages for the breach of a contract is the amount of the loss which the injured party has sustained thereby. * * * The second item, profits, can not always be recovered. They may be too remote and speculative in their character, and therefore incapable of that clear and direct proof which the law requires. But when, in the language of Chief Justice Nelson, in the case of *Masterton* v. *Mayor of Brooklyn*, 7 Hill, 69, they are 'the direct and immediate fruits of the contract,' they are free from this objection; they are then 'part and parcel of the contract itself,

entering into and constituting a portion of its very elements; something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfillment of any other stipulation.'"

See also *United States* v. *Speed*, 8 Wall. 77, 84; *Roehm* v. *Horst*, 178 U. S. 1, 21.

Interest Expended.

This is the first item reserved in the contract of settlement, par. 1, p. 63, and alleged in the petition, par. XVII, p. 7. It is claimed in par. XX, p. 8.

The three supplemental agreements of January 15, February 11 and October 23, 1918, pp. 40, 42, 55, provide for advances by the government to the contractor. Interest is to be paid by the contractor upon these advances and the principal and interest are to be repaid by deductions from the amounts due from time to time to the contractor. It is to be observed that the interest itself, although a cost to the contractor, was excluded by the contract, p. 26, par. (4), from repayment as a cost and must therefore be paid by the contractor from its fixed profit, an item which was payable only on delivery of completed motors, p. 13, Article IV, par. (2); p. 37, Article III.

The interest ran under each agreement from its date, Article V, p. 41; Article V, par. *a*, p. 43; Article VII, p. 58, and continued until the final settlement of August 14, 1919, Article 3, p. 61, "computed to date of payment." It continued to be charged to this late date, although the agreement itself acknowledges unpaid credits beginning as early as January, 1919, to the sum of $148,543.51, which should have been earlier credited so as to stop the

payment of interest. See agreement, Articles 4-6, p. 61, explained in pars. 4-6, p. 65.

The government delayed the contractor by not furnishing specifications promptly and thus prevented complete deliveries and payment to the contractor of cost and profit, from which the borrowed money would have been paid. If the specifications had been furnished promptly, the deliveries would all have been made, as required by Article II, p. 36, by September, 1918, as alleged in the petition, par. XIX, pp. 7 8, and repayment then made of the entire advances.

Thus the interest which the contractor paid to the Government would not have been payable had the government furnished the specifications promptly.

The last advance would not have been made at all, as the contract would have been completed before its date. The government thus charged the contractor with a cost which was entirely due to its own default. This comes clearly within the rule of damages stated in the cases already cited.

See authorities cited in *Hatticsburg Lumber Co.* v. *Herrick*, 212 Fed. 834.

The obligation of the government to do its part toward the production of the articles and the obligation of the contractor to pay interest on the money advanced for the purpose of enabling him to speedily produce the articles were inter-dependent promises.

In *Bank of Columbia* v. *Hagner*, 1 Pet. 455, the court said, p. 465:

"In contracts of this description, the undertakings of the respective parties are always considered dependent, unless a contrary intention clearly appears. A different construction would in many cases lead to the greatest in-

justice, and a purchaser might have payment of the consideration money enforced upon him, and yet be disabled from procuring the property for which he paid it.

"Although many nice distinctions are to be found in the books upon the question whether the covenants or promises of the respective parties to the contract are to be considered independent or dependent; yet it is evident the inclination of courts has strongly favored the latter construction, as being obviously the most just."

In *Guerini Stone Co.* v. *Carlin Construction Co.*, 248 U. S. 334, 345, the court said:

"As is usually the case with building contracts, it evidently was in the contemplation of the parties that the contractor could not be expected to finance the operation to completion without receiving the stipulated payments on account as the work progressed. In such cases a substantial compliance as to advance payments is a condition precedent to the contractor's obligation to proceed."

The application of this principle is clearly seen by realizing that according to the theory of its defense the government might have suspended production indefinitely, prevented the contractor from earning anything at all on this contract and compelled it to hold itself and its plant in readiness and yet, at the same time, have continued to charge interest to any length of time.

The payment of interest on a bank loan, petition, p. 8, par. XX, second item, made necessary by the same default is no less a direct item of damage to the contractor than the payment of interest to the United States.

The cost of revenue stamps on the notes also claimed, par. XX, p. 8, follows the same principle.

The provisions of Sec. 177 of the Judicial Code forbidding judgment in the Court of Claims for interest

upon a claim have no application to this item because this is not interest upon a claim. It is a loss directly inflicted upon claimant by the default of the United States. A far more liberal rule of construction of this section than is here required was made in *United States, v. New York*, 160 U. S. 598, where interest paid was allowed as an item of "costs, charges and expenses" reimbursable by the United States.

The Court of Claims says of this item, p. 71:

"The contract expressly provided that the plaintiff should pay interest on the sums of money advanced it by the United States. There is nowhere in the contract any qualification of this provision, and it is not perceived how this court can relieve the plaintiff of its obligation."

This court is asked to relieve the claimant of this obligation because it would not have been incurred except for the failure of the United States to perform its part of the contract.

Unabsorbed Commercial Losses.

When appellant undertook this contract, it had to discontinue its commercial business and suffered a loss of $238,261.26 in so doing, petition, par. III, p. 1; par. XIX, p. 7; claim reserved, par. XVII, p. 7; Ex. K, Art. X, par. 2, p. 63. It was expected that this loss would be made good out of the fixed profit of $1,500,000 on the completed motors, as well as the uncertain profit on spare parts and on savings under Articles IV, V, p. 37, Article IV, par. (3), p. 13, and Article VI, par. (7), p. 15. But profit was realized only to the extent of $298,-148.04, par XIX, p. 8, and the failure of the contractor to realize the entire profit and thus absorb the loss was

due to the failure of the United States to furnish the specifications on time. That the loss still rests upon the contractor is therefore the fault of the United States and the contractor should be reimbursed therefor.

The Court of Claims rejects this claim on the following ground, p. 71:

"The plaintiff voluntarily entered into the contract with the United States with full knowledge that its commercial contracts must be abandoned, and it was willing to do this and lose these commercial contracts in view of the large profits which it expected to receive under its contract with the United States."

No complaint would be made on account of this loss, had the United States not prevented the completion of the contract by its default, but the present existence of this loss is directly due to this default.

A loss of the same nature as this was allowed in *Baird v. United States*, 5 C.Cls. 348; affirmed by this court, 131 U. S. appendix cvi.

Two concessions must be made in regard to this item:

(a) If the contractor is allowed the amount of its profits as damages under the first item, this item is not allowable, as it is discharged by the profits.

(b) The United States is entitled to credit upon it in the proportion which the profits actually received bears to the total profits which would have been received had the default of the United States not occurred. It is impossible to state what would have been the profits on the spare parts under Article IV, p. 13. The loss of $238,261.26 should be amortized upon the basis of $30,000 received as profit on 40 motors delivered at $750 each in proportion to a total expected profit on 2000 motors, Ar-

ticle III, p. 37, a total of $1,500,000. The proportion thus absorbed is one-fiftieth, amounting to $4,765.23, and the balance still a loss to the contractor is $233,496.03. This is the correct basis. But if the loss of $238,261.26 is to be amortized upon the basis of $298,148.04 received out of a profit of $750 on each of 2,000 motors, Article III, p. 37, a total of $1,500,000, the proportion absorbed is $47,358.08 and the balance still a loss to the contractor is $190,903.18.

CONCLUSION.

The reference in the opinion of the Court of Claims above quoted to the "large profits" expected from this contract (a major fraction being repayable as excess profits taxes) alone justifies a statement of the present result of the contract, so far as shown in this petition.

The contractor suffered a loss on its commercial business, par. III, pp. 1, 2.....	$238,261.26
The contractor paid interest, par. XX, p. 8, not reimbursable as cost, Article V, p. 14; par. (4), p. 26.....	152,808.93
A total of losses herein disclosed..	$391,070.19
It has received as profit upon motors produced and materials in process, par. XIX, pp. 7-8.....	298,148.04
Leaving a net loss of.....	$92,922.15

This does not take into account the other non-reimbursable items of par. (4), p. 26, or the very great loss involved in getting the plant back into condition to do commercial work and the continuing overhead during that period.

It is respectfully submitted that the judgment of the Court of Claims sustaining the demurrer should be reversed and the case remanded for trial on its merits.

GEORGE A. KING,
WILLIAM B. KING,
GEORGE R. SHIELDS,
Attorneys for Appellant.

APPENDIX A.

EXTRACT FROM "AMERICA'S MUNITIONS 1917-1918",

Government Printing Office, 1919,

Pp. 289, 290.

Another disappointing experience in attempting to produce a foreign designed motor in this country was the project to bring the manufacture of Bugatti engines to the United States. When our European aircraft commission arrived in France, the first experimental Bugatti engine had just made its appearance. It was apparently a long step in advance of any other motor that had been produced. This French mechanism was a geared 16-cylinder engine. It weighed approximately 1,100 pounds and was expected to develop 510 horsepower. It seemed to be the motor to supplement our own Liberty engine construction. Although heavier than a Liberty, it was much more powerful. The first Bugatti engine built in France was purchased by the Bolling commission and hurried to the United States with the urgent recommendation that we put it into production immediately and push its manufacture as energetically as we were pushing that of the Liberty engine.

The Signal Corps acted immediately upon this advice and prepared to proceed with the Bugatti on a scale that promised to make its development as spectacular as that of the Liberty. The Duesenberg Motors Corporation of Elizabeth, N. J., was even then tooling up for the production of Liberty engines. We took this concern from its Liberty work and directed it to assume leadership in the production of the Bugattis. The Liberty engine construction had been centered in the Detroit district. We now prepared to establish a new aviation engine district in the East, associating in it such concerns as the Fiat Plant at Schenectady, N. Y., the Herschell-Spillman Co., of North Tonawanda, N. Y., and several others. For a

time the expectation for the Bugatti production ran almost as high as the enthusiasm for the Liberty engine, but the whole undertaking ended virtually in failure, a failure again due to the tremendous difficulty in adapting foreign engineering plans to American factory production.

This was the story of it. In due time the sample Bugatti engine arrived, and with it were several French engineers and expert mechanics. But, once set up, the Bugatti motor would not function, nor was it in condition to run; for, as we discovered, during its test in France a soldier had been struck by its flying propeller. His body had been thrown twice to the roof of the testing shed, and the shocks had bent the engine's crank shaft. Then, too, we learned for the first time that the design and development of this engine had not been carried through to completion and that a great deal of work would be required before the device could be put into manufacture. The tests in France had developed that such a fundamental feature as the oiling system needed complete readjustment, and this was only indicative of the amount of work yet to be done on the engineering side of the production. We did our best with this engine; but to redesign it and develop it so that it could pass the severe 50-hour test demanded by our Joint Army and Navy Technical Board was the work of months, and after that the tooling up of plants had to be accomplished. The American Bugatti was just getting into production when the armistice was signed, a total of only 11 having been delivered.

APPENDIX B.

AUTHORITIES ON SPECIFICATIONS

1. Meaning and importance of specifications.

An able English work thus defines the purpose of specifications (Macassey & Strahan, Law of Civil Engineers, Architects, etc. (2d ed. 1897) p. 51):

"*Specifications.*—The specification of an intended work is the written description of such work, by means of which and the drawings the builder is able to form an estimate of the cost, and also to carry out the work to completion. * * * In general terms, the drawings indicate the dimensions and shape, while the specification describes the nature and quality of the material to be used in the intended work or building. It will, of course, be apparent that accuracy in the specification is essential, and a certain degree of fullness is also requisite."

The same authors (p. 44) remark how "a few words in a specification" may involve a large amount.

Nave v. *McGrane*, 19 Idaho, 111, 118, says:

"Specifications ought to be so definite as not to leave the quality of the material or of the workmanship in the construction of any part of the building to the mutatory whim or caprice of the supervising architect or contractor. In justice to both the owner and contractors, the plans and specifications and the contract for the construction of the building should be complete, definite and specific."

Emphatically is this true of this contract, where the contractor had no guide whatever as to the character of the articles required by the Government until the specifications were furnished.

2. Effect of failure to furnish specifications.

In *Hinckley* v. *Pittsburgh Steel Co.* 121 U. S. 264, affirming 17 Fed. 584, the contractor was to purchase six thousand tons of steel rails "to be drilled as may be directed," and to be delivered within a certain time. The purchaser failed to give the necessary drilling directions until the time had expired, and then refused to take any of the rails on the ground that the contract period was over. The court held the purchaser liable in damages for breach of the contract

In *Horst* v. *Rochm*, 84 Fed. 565, the court said (p. 570):

"The plaintiffs were, by the act of the defendant, prevented from making the deliveries called for by the contracts. It is this anticipatory denial and obstruction of the right to deliver, not a tender and refusal, which is the ground of suit, and the measure which might otherwise have been applicable is therefore wholly inappropriate. The law of damages is not comprised in a set of arbitrary rules."

This decision was affirmed by the Circuit Court of Appeals, 91 Fed. 345, and by the Supreme Court of the United States, 178 U. S. 1.

Stafford Co. v. *Alta Vista Mills*, 218 Fed. 759, involved the question of damages for failure to furnish specifications. After reviewing several pertinent decisions the court concluded (p. 764):

"In the case at bar the record indicates that defendant failed to give specifications which it agreed to furnish, because it had decided to change the class of goods to be manufactured, and did not want the kind of looms which had been ordered from the plaintiff. It therefore seeks to take advantage of its own refusal to comply with its part of the agreement in order to evade the contract obligation into which it had entered."

In *Mansfield* v. *N. Y. Central R. R.* 102 N. Y. 205, the same principle is involved.

The contractor agreed (p. 210):

"To commence the erection of the elevator within five days after notice from the engineer that the foundations are ready, and to complete the same ready for the use of all the lofting elevators within five months thereafter."

The owner notified the contractors that foundations were ready, but the statement was not true. There was a long delay before the foundations were actually prepared. The contractors for this reason were unable to complete within the time limited by the contract.

On suit brought by the contractors against the railroad for damages caused to them by delays in preparing the foundations, the court held them entitled to recover. The Court said (p. 210):

"It was the indispensable condition to the performance of any of the obligations assumed by the contractors that the foundations should be prepared, and unless they were to be so prepared, it rendered the whole contract motiveless and nugatory."

The decision is summarized as follows (syllabus, par. 1):

"Where the obligation of performance by one party to a contract presupposes the doing of some act on the part of the other prior thereto, the neglect or refusal by the latter to perform such act not only dispenses with the obligation of performance by the former, but also entitles him to rescind, or where recission will not afford him an adequate remedy, to continue the work, and recover such damages against the defaulting party as the delinquency has occasioned."

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14561—22— —1

In the Supreme Court of the United States.

OCTOBER TERM, 1922.

DUESENBERG MOTORS CORPORATION, appellant,
v.
THE UNITED STATES. } No. 80.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This is an appeal by the Duesenberg Motors Corporation, hereinafter called the contractor, from a judgment of the Court of Claims sustaining the demurrer of the United States to the petition of the claimant. The claim is based upon certain contracts between the contractor and the United States entered into during the war and terminated by the United States at the time of the armistice. The amount claimed is $1,201,851.96 (p. 9), and the claims are:

First. A claim for damages for delay in the completion of a contract for the production of 2,000 Bugatti motors, due to the fact, as alleged, that the specifications for the same were not seasonably furnished by the United States. The amount of this

for overhead and depreciation. *Interest*, rent, advertising, collection expenses, credit losses, discounts, and such taxes as income and excess-profits taxes imposed by the Government of the United States were not to be included, the language of the contract being that "nothing herein shall be deemed to include interest," etc. The profit to the contractor under this contract was $913.05 on each engine. In addition, he was to receive a specified profit upon such spare parts as might be ordered by the Government and an additional profit to be based upon any savings which he might effect from the estimated cost stated in the contract. Article XI of the contract (p. 20) contained provisions for its termination either because of the failure of the contractor to comply with its terms or in the event that in the opinion of the Chief Signal Officer of the United States Army the public interests should so require. In the event of the cancellation or termination of the contract for any reason other than the default of the contractor, the amounts to be paid by the Government were clearly set forth (p. 21), and finally it was provided that—

> In the event of the termination of this contract as aforesaid, any and all obligations of the Government to make any payments to the contractor hereunder, other than those specified in this contract, shall at once cease and determine.

All the subsequent contracts between the parties are called supplemental contracts; and while the

terms of the original contract were altered in many ways, the provisions regarding termination were not altered, and each supplemental contract distinctly reaffirmed the original contract in so far as it was not modified.

On December 11, 1917, a supplemental agreement was made. (Exhibit B, pp. 33–34.) By this agreement the fixed profit was changed from $913.05 to $625.00 for each engine. The amount of estimated cost was also changed, and it was agreed that the Government should place with the corporation an additional order for 500 engines, making 1,000 engines in all.

On December 24, 1917, the contractor was notified to stop work on the engines, as it had been decided to substitute at least an equal number of engines of a different type called the Bugatti motors.

On January 4, 1918, another supplemental agreement was made between the parties (Exhibit C, pp. 35–39) whereby it was provided that instead of the articles described in the previous contracts the contractor should make for the Government 2,000 Bugatti motors in accordance with specifications to follow. This agreement changed the profit which the contractor should receive from $625 to $750 for each engine and also provided (Art. VI, p. 37) that all costs and expenses incurred by the contractor in connection with the two previous contracts should be allowed and paid by the Government as part of the cost of making the Bugatti engines under the new contract, and, except as modified, the provisions

of the first contract should remain in full force and effect. This was the final production contract, and it is under it that the claims herein involved arise.

On January 15, 1918, a further agreement was made between the parties (Exhibit D, pp. 40–41) whereby the Government agreed to advance the contractor an amount of not more than $1,250,000, conditioned upon the approval of the War Credits Board, which the contractor was to repay *with interest* at 5 per cent.

On February 11, 1918, a further agreement was made between the parties (Exhibit E, pp. 42–45) making provisions for a further advance by the Government to the contractor of $400,000 *with interest* at the rate of 6 per cent.

On February 14, 1918, the parties entered into a further agreement (Exhibit F, pp. 46–68) relating to the purchase of the plant at Poughkeepsie, New York, of the F. I. A. T. Corporation, but this agreement does not seem to bear any relation to the controversy involved herein. To this agreement was annexed a schedule (Exhibit G, pp. 49–50).

On September 26, 1918, a further supplemental agreement was made between the parties (Exhibit H, pp. 51–54) regarding a testing building being erected at Elizabeth, New Jersey, but this agreement does not seem to have any bearing upon the present controversy.

On October 23, 1918, the parties entered into a further supplemental agreement (Exhibit I, pp. 55–59) providing for further advance payment by the

Government, upon which the contractor was to pay *interest* at the rate of 6 per cent.

While the construction of the Bugatti motors was actively proceeding, hostilities were suspended by the armistice, November 11, 1918. Whereupon the contract was terminated by the Government according to its terms. Thereafter the contractor submitted to the Secretary of War its claim for a settlement of the liability of the United States under its contract and, after negotiations, the settlement agreement of August 14, 1919 (Exhibit K, pp. 59–63), was made. This agreement was a complete settlement between the contractor and the United States of all matters growing out of the contracts with the exception of the three claims hereinbefore mentioned as the basis of this suit.

ARGUMENT.

The only basis for this claim is a desire to obtain through the Court of Claims damages for blasted hopes.

When the armistice came the contractor had a sure hope and expectation of making a profit of $1,500,000. This was as certain as anything in this world can be if the war continued, but when peace came this hope vanished. Such misfortune, however, does not justify a judgment against the United States. The relation of the parties was that of contractors, and their rights and liabilities were fixed by their written agreements. If the United States lived up to its contractual obligations, it is not liable

in damages, and we contend that the petition alleges no facts showing a breach of contract by the United States upon which liability may be predicated.

While the petition contains some statements finding fault with some things done by the Government, there is no allegation that it broke its contract. It is stated that the first contract provided that the engines should be in accordance with drawings and specifications attached thereto, but that no such drawings or specifications were annexed to the contract. Of course, the contractor knew this at the time the contract was made, and under Article III of that contract (p. 12) it is recited that the present uncertain factors inherent in the articles and in the establishment of the industry producing them are such that it was understood that the schedule might require revision. Paragraph 4 of the petition alleges that the drawings and specifications were furnished "piecemeal from time to time, but not so as to enable the claimant to enter into quantity production." This is not an allegation of breach of contract; and even if there was a breach of contract, it was waived by making the subsequent agreements (Exhibits B and C), and, as already pointed out, the later and final production contract contained a provision obligating the United States to pay all the costs and expenses incurred by the contractor under the two previous agreements, so the contract (Exhibit C) which substituted the Bugatti motors for the Liberty motors became the final contract between

the parties, and everything prior thereto became merged in that contract.

This contract provided for the making of the motors in accordance with specifications to follow. In the petition it is alleged that this provision, together with the provision for the delivery of the motors, and the absence of any provision for work of an experimental character, were based upon a belief on the part of the officers of the United States that there were in existence complete specifications which needed only to be obtained from France, and it is alleged that these statements in the contract operated as a "representation" to the contractor that such was the fact and that production in quantity could begin at or shortly after the making of the agreement. It turned out to be otherwise, however, and when the first Bugatti engine was received in this country, such extensive changes were necessary that no complete specifications were furnished prior to September 25, 1918. The time limit fixed by the contract had almost expired and a production release was given to the contractor and he was ordered to proceed with the production as required by the contract.

The appellant concedes that the termination of the contract was not a breach and his claim is that the breach was in the delay in furnishing the specifications prior to the termination. (Appellant's brief, p. 12.) His reasoning is (1) that the contract made time of the essence of the contract and required deliveries to begin in March and end in September,

1918, and held the contractor to the most rigid rule of promptness; (2) that this provision necessarily implied that the United States must do everything required in the covenant in time to permit the contractor to comply with its obligations; (3) that the provision of the contract for specifications to follow necessarily implied that the specifications must be furnished in time to permit the deliveries to be made on time; and (4) that the failure to furnish specifications in such time was a breach of contract. One would gather the impression from this that the primary object of this contract was to enable the contractor to earn his profit within a certain time, and that the delivery of the motors to the United States on time was a secondary consideration. There is no warrant for such an assumption either in the contract or in any principle of law. These provisions are obviously for the benefit of the Government and beyond question could be waived by the Government. If the Government was suing the contractor for failure to deliver within the specified time, it would be a complete defense that the specifications were not furnished in time. The appellant is trying to use a shield as a sword. We know of no authority, and the appellant has cited none upon his brief, which holds that the failure to furnish specifications furnishes an affirmative cause of action unless that failure was unreasonable, willful, or of a character to be covered by the word "wrongful."

Of course, the Government could not insist upon compliance by the contractor with the terms of the

contract unless it did its part, and it is also true that the furnishing of specifications must necessarily precede the construction of the motors, and if the Government had unreasonably or willfully or in any wrongful way neglected or refused to furnish specifications, that neglect or refusal would be a defense to the contractor and under certain circumstances might be an affirmative ground for relief; but the contract did not require the Government to furnish the specifications within any definite time, and there is no allegation that the delay was unreasonable, unnecessary, willful, or in any manner wrongful. The position of the appellant would lead to this conclusion, namely: If the motors had all been constructed, but the construction had lasted beyond September, and the contractor had been paid his entire profit under the contract, nevertheless he would have had a further claim because he had not received his profit within the original time. Mere *delay in earning his profit* is not a cause of action. The cause of action which he attempts to establish is for *loss of profit* and that loss was due to the termination of the war; and even if the war had not ended, the contract could have been terminated by its terms at any time.

Appellant in its brief refers frequently to the fact that the delay was not its fault. A cause of action, however, must be based not upon the appellant's lack of fault but upon the wrongful conduct of the Government, and nowhere in the petition is there any allegation of fact sufficient to charge the United States with wrongful conduct. Such allegation as

there is is contained in paragraph 11 of the petition on page 5. The substance of this allegation is that the statement made in the supplemental agreement of January 4, 1918, that the motors were to be constructed in accordance with specifications to follow, together with the provisions of the agreement providing for deliveries beginning with the month of March, together with the absence of any provisions in the contract for experimental work, "were based upon a belief on the part of the officers of the United States" that there were in existence complete specifications to be obtained from France. This is not an allegation of anything except the state of mind of the officers of the United States. The petition further states that "the statements in said contract operated as a representation to the claimant company that such was the fact." All this amounts to is that the provision in the contract calling for delivery of the motors within a certain time, and which provision was for the benefit of the Government, and not merely to enable the contractor to earn his profit within a certain time, was based upon an honest belief in the existence of certain facts subsequently found to be untrue.

It is not alleged that the contractor knew less about the situation than the Army officers, or that he believed the "representation" and trusted and relied upon it, and, furthermore, there is no such representation in the contract.

MacArthur Bros. Co. v. *United States*, decided by this court February 27, 1922, was an action to recover

damages for a breach of contract growing out of an alleged misrepresentation. The misrepresentation was alleged to be that the contract represented that a portion of the work would be done in the "dry" and a portion in the "wet," whereas it was impossible to do any of the work in the "dry," and it was all done in the "wet," at a cost greatly exceeding what it would have been had it been done the other way. The Court of Claims dismissed the petition upon demurrer by the Government, and its decision was affirmed by this court in an opinion by Mr. Justice McKenna, who, after examining the contract and various authorities, said:

> The elements which existed in each of the cited cases are absent from the case at bar. In the case at bar the Government undertook a project and advertised for bids for its performance. There was indication of the manner of performance, but there was no knowledge of impediments to performance, no misrepresentation of the conditions, exaggeration of them, nor concealment of them, nor, indeed, knowledge of them. To hold the Government liable under such circumstances would make it insurer of the uniformity of all work and cast upon it responsibility for all of the conditions which a contractor might encounter and make the cost of its projects always an unknown quantity.
>
> See also *Mansfield* v. *N. Y. C., etc., R. R. Co.*, 102 N. Y. 205, *infra*.

Neither misrepresentation, false representation, concealment, or fraud is alleged or intimated, and

the contract distinctly says, in Article III of the original contract, page 12 of the record, that "in view of the present uncertain factors inherent in the articles, and in the establishment of the industry of producing them, it is understood that this schedule may require revision." The schedule is the schedule of deliveries, and the subsequent contract, the one involved in the suit, makes this provision a part of that contract.

There was no protest made at the time. On the contrary, the allegation is that an expert engineering officer of the Army was put in charge with instructions to make as promptly as possible such changes as were necessary for the production of the engines and that the officers and experts of the claimant company diligently cooperated with the officers and experts of the Signal Corps. So the Government claims, not in any spirit of captious criticism of the petition as a pleading, but upon the merits, that it contains no allegations of any wrongful conduct on the part of the Government, which by any fair inference can be considered a breach of contract. As the Court of Claims expresses it, page 71:

> No such allegation is made in the petition, for it appears that the parties mutually agreed in the delay now complained of. The very nature of the contract was such that changes in the specifications, and the delays incident thereto, were contemplated when the contract was entered into. The plaintiff took the risk in these changes and delays along with the

> risk that the contract might be terminated before the articles contracted for were completed.

With the general principles of law so extensively set forth upon appellant's brief we have no quarrel. Not one of the authorities cited holds that a claim of breach of contract can be based upon anything short of wrongful conduct.

The issues involved in the case of *United States* v. *Behan*, 110 U. S. 338, are indicated by the following language from the opinion (p. 346):

> The party who voluntarily and wrongfully puts an end to a contract and prevents the other party from performing it is estopped from denying that the injured party has not been damaged to the extent of his actual loss and outlay fairly incurred.

In that case there was an abandonment by the United States of the work being performed.

The case of *St. Louis Dressed Beef & Provisions Company* v. *Maryland Casualty Company*, 201 U. S. 173, was an action founded on an employer's liability policy. The plaintiff had made a prudent settlement of a suit against it, which the defendant by its policy was obligated to defend and which it refused to defend, denying all liability. In a suit brought to recover the amount paid in settling the case this court held that the defendant was liable. This case has no bearing whatever upon the present case.

The case of *Philadelphia, Wilmington & Baltimore Railroad Company* v. *Howard*, 13 Howard 307, was an action in which a contract was annulled. The syllabus says:

> If the company annulled the contract merely for the purpose of having the work done cheaper, or for the purpose of oppressing and injuring the contractor, he was entitled to recover damages for any loss of profit he might have sustained; and of the reasons which influenced the company, the jury were to be the judges.

The case of the *American Smelting & Refining Company* v. *The United States*, decided May 15, 1922, was a claim for over $500,000, being the price of 20,000,000 pounds of copper at 26 cents per pound, less payments received at 23½ cents. The order was accepted at a time when the price-fixing committee of the War Industries Board had fixed the price at 23½ cents per pound. All of the copper, except the 20,000,000 pounds, was delivered before July 2, 1918, on which date the price was advanced to 26 cents per pound. The reason why all the copper was not delivered prior to that date was the alleged delay due to the failure of the Government to send shipping orders and to the further fact that deliveries were made impossible by the Government's appropriating all the available copper for other uses. Nevertheless the Court of Claims sustained a demurrer to the petition, and its judgment was affirmed by this court in an opinion by Mr. Justice Holmes.

In *United States* v. *Smith*, 94 U. S. 214, the only question presented was the liability of the United States for damages growing out of the suspension of work under a contract sued upon. The contract bound Smith to do the work and *no power was reserved by the United States to direct its suspension.* The work was stopped by order of the United States. Smith asked to be released from his contract unless he could go on. This was refused until the expiration of 60 days, when he was allowed to resume.

In *McMaster* v. *New York*, 108 N. Y. 542, there was a clear breach of a contract for furnishing of sandstone for the erection of certain buildings in accordance with plans and specifications. After three of the buildings had been completed according to the plans and contracts, the managers resolved to build the other buildings with brick, with sandstone trimming, instead of building them of sandstone, as originally provided. The contractors protested against the change, but furnished and cut the sandstone required, and received pay at the prices fixed. After completing six buildings they were notified to remove the stone, all work was stopped, and nothing done toward the erection of the five remaining buildings.

It was held that this was unauthorized and that the State could not abandon performance for an indefinite period, but was bound to go on without any unnecessary delay until all the buildings were completed and that the abandonment of the work as to the five buildings entitled the contractors to dam-

ages. The breach of contract was gross and palpable. The reasoning of the New York Court of Appeals in this case is illustrated by the following language, which immediately precedes that quoted on page 18 of the appellant's brief:

> The general character of the buildings could not be changed so that the buildings would not be the same contracted for; if it could be, then a public letting in such a case would not be a useful and might be an idle ceremony. Under such a reservation could a building planned for five stores be reduced to two? Could a stone building let to a stonemason be changed to wood or brick? Could the five connecting wards be reduced to two or three or four? We are clear that authority for such extensive changes could not be found in such language. If the State could change the brick walls with sandstone trimmings, then it could change to walls made wholly of brick and thus there would be no stone to cut and the cutting contract would be entirely nullified.

The case of *United States* v. *Freel*, 186 U. S. 309 merely held that the surety on a contractor's bond for the construction of a dry dock was released by a change, made without his consent, in the location of the dock which required the contractor to make additional excavations and connections at an increased expense, and gave an increased time of performance.

In *Mansfield* v. *New York Central, etc., R. R. Co.*, 102 N. Y. 205, the action was brought to recover damages for breach of contract for the construction

of an elevator. The contractors agreed to commence work within five days after notice from defendant's engineer that the foundations were ready, and to complete the same within five months; and it was agreed that the contractors should receive, in addition to the contract price, $500 for each day less and to pay $500 for each day more than the time stipulated occupied in the work. Defendant served the notice required, *but at the time of such service the piers and foundation walls were not completed.* In an action for damages by reason of increased expense in doing the work, and for losses arising from delay caused by the want of readiness on the part of the defendant, the court held the action could be sustained. The court pointed out that notice to be given was *of an actually existing condition, and not the expression of an opinion* on the part of the engineer that the foundations were sufficiently advanced to enable the contractors to prosecute their work advantageously, and that there was no rule of law which would justify a party required to give notice to another of the existence of a fact upon which important obligations depend, to do so untruly, or in such a manner as to prejudice the rights of the party entitled to notice. And the court said, on page 212:

> A construction which enabled the railroad company to retard the prosecution of the work by the contractors, or disabled them from employing all of the agencies or force which in their judgment could wisely and advantageously be used in its performance, would operate

> as a fraud upon them and render their covenant to complete the work in five months a reckless and foolhardy undertaking.

The court further said that—

> It was unreasonable to suppose that the parties intended to enter into obligations providing for the performance of work by one party under a heavy penalty for nonperformance within a given period which yet left it optional with the other to facilitate or retard such work at its pleasure or discretion.

There is no allegation in the present case of any action by the United States or any of its officers which would "operate as a fraud."

In the absence of any allegation showing a breach of contract by the United States, the authorities upon the measure of damages require no discussion.

(*a*) *As to the claim for prospective profits.*—Article XI of the contract provides that upon termination the Government shall pay to the contractor all expenses incurred in connection with the performance of the contract and not already paid to the contractor, including all material purchased; all costs of production, overhead, general administrative expenses, etc., as itemized in article 5 of the contract, and also on each finished article accepted, the sum provided as fixed profit, and on all unfinished articles and parts thereof, a sum to be determined in a manner specified, and all obligations of the Government to make any payments to the contractor other than those specified shall at once cease and determine. These

payments were made to the contractor, or at least all matters of that character were adjusted by the settlement agreement (Exhibit K). There was no provision in the contract requiring the Government under any circumstances to pay anything for loss of prospective profits. The Government did not *guarantee* that the contract would be completely performed. On the contrary it reserved the right to terminate at any time on thirty days' notice. The contractor took that risk. Indeed, that was the only risk it did take—the risk of not making as much money as it hoped to make. It can not recover from the Government damages because the war came to an end before that hope was realized.

(*b*) *As to the claim for interest.*—Pursuant to the supplemental agreements (Exhibits D, E, and I), the United States advanced to the contractor $2,150,000, and the agreements distinctly provided that the amounts advanced should be repaid with interest in any event, *including the termination of the principal agreement by the Government* (pp. 41, 43, 58). The contractor also borrowed money from the First National Bank of New York and claims to have paid by way of interest upon these loans $152,278.93, together with the sum of $530 for revenue stamps attached to the notes.

By Article II of the contract (Exhibit A), which remained in force throughout all transactions, the contractor agreed to furnish such organization, plant, labor, material, etc., as might be necessary. The contractor was to receive the actual cost of production

as defined in Article V, but in estimating actual cost nothing was to be allowed on account of interest. There is no provision in any of the agreements which by possible inference can give color to any claim for interest. This item of the claim is wholly without merit, and the Comptroller of the Treasury has so decided (26 Comp. Dec. p. 192).

Of course, when the claimant borrowed money and gave its notes, stamps had to be affixed to the notes. The Government did not agree to bear any of the expenses involved in this whether the money was borrowed from the bank or from the Government itself. The cost of the revenue stamps was merely incidental to the interest upon the loans, which was expressly excepted from the costs which the Government was to pay.

The case of *United States* v. *New York*, 160 U. S. 598, cited by appellant in support of this item, involved the question of payments to be made by the United States to the State of New York to reimburse it for expenses in raising troops for the national defense under the act of Congress of July 27, 1861. The act provided that the State should be reimbursed for the "costs, charges, and expenses properly incurred." This court said that the only inquiry was whether, within the fair meaning of these words, interest paid by the State of New York on moneys borrowed for the purpose of raising, subsisting, and supplying troops to be employed in suppressing the rebellion could be included, and held that it could be.

(c) *As to the claim for unabsorbed investment.*— is alleged in the petition that at the time the first ontract was made the contractor was engaged in he production of engines and had large commercial ontracts and that he had "an unabsorbed invest- ent" of $238,261.26 in these contracts which e would have received back but which became a otal loss. In none of the contracts can there be ound any provision which even remotely suggests hat the Government would reimburse the contractor or any item of this kind, and the allegation that he ould have received it back is merely the highly peculative conclusion of the pleader.

It is alleged that it became necessary for the con- ractor to discontinue all these contracts, and that he officers of the Government required the con- ractor to do so. The contractor was probably lad to do so, if that was made a condition of obtain- ng the Government contracts.

Nevertheless, the contract did not so require and rovided merely that the claimant should "give the erformance of this contract precedence over all ther work for parties other than the Government." his claim is wholly outside of the terms of settle- ent provided for in the contract.

Appellant cites upon his brief as authority for this tem of his claim the case of *Baird* v. *United States*, 31 U. S. appendix CVI, a case wholly without pplication.

That was an action upon a contract between the surviving partner of a firm of locomotive builders

and the United States for the construction of 15 locomotive engines. The locomotives were to be constructed at the "earliest practicable period," "to the exclusion of all other interests or contracts whatever, it being understood" that the contractors would be "indemnified from any damage resulting from a compliance of this order." It was added that "in replacing any engines taken from other parties in filling this order you are authorized to charge the Government any advance in the cost of labor and materials over the cost of those on the 9th of November, 1863." In affirming the judgment of the Court of Claims in favor of the claimant, this court said (131 U. S. appendix CVIII):

> It is equally clear that the 15 engines constructed for the Government displaced and postponed the construction of an equal number under the contracts of Baldwin & Co. with other parties, and subjected them to a loss of $1,250 on each engine so postponed. If the indemnity clause has any meaning or effect it must be held to include this charge also.
>
> See also *Morrisdale Coal Co.* v. *United States*, decided by this court May 29, 1922.

Assuming that the contractor had, at the time it began its work for the Government, various outstanding business ventures in which it had an unabsorbed investment, it is, of course, only fair to assume that the claimant expected to make enough money out of its Government contracts so that it

could afford to lose something on its other business. The end of the war and the termination of the Government contracts naturally brought disappointment.

Hope deferred may make the heart sick, but it gives the Court of Claims no jurisdiction.

CONCLUSION.

No cause of action being set forth in the petition, the judgment of the Court of Claims should be affirmed.

JAMES M. BECK,
Solicitor General.
ALFRED A. WHEAT,
Special Assistant to the Attorney General.
OCTOBER, 1922.

○

3. Time was of the essence for the Government, but not for the contractor. P. 124.
56 Ct. Clms. 96, affirmed.

APPEAL from a judgment of the Court of Claims dismissing, on demurrer, a petition claiming (1) the profits that would have been made by the claimant, under a contract with the Government for manufacture of air-plane motors, but for the Government's alleged failure to supply the necessary specifications as agreed; (2) amounts paid by the claimant, because of the delay, as interest on money borrowed from the Government and private sources for use in executing the contract; and (3), if (1) cannot be recovered, the amount lost by the claimant through terminating its commercial business to accept the contract.

Mr. George A. King, with whom *Mr. William B. King* and *Mr. George R. Shields* were on the brief, for appellant.

The contract of January 4, 1918, for the Bugatti motors is the one upon which this suit is based. Time was of the essence of this contract. It required deliveries to begin in March and end in September, 1918, and held the contractor to the most rigid rule of promptness. This provision necessarily implied that the United States must do everything required of the Government in time to permit the contractor to comply with its obligations.

The contract provision for "specifications to follow" necessarily implied that the specifications must be furnished in time to permit the deliveries to be made on time.

The failure to furnish specifications in such time—they were not complete until September 25, 1918—was a breach of contract by the United States which entitles the contractor to recover for the losses caused thereby.

These propositions rest upon elementary principles: "What is implied is as effectual as what is expressed." "Specifications to follow" implies within a reasonable

time; but this means a reasonable time within the intent of this contract, when its parts are construed together. The schedule of deliveries, beginning in March, 1918, shows that intent, as do the many expressions of the need of promptness.

Upon breach of contract by one party, the other may continue work without waiver of its right to damages. *American Smelting & Refining Co.* v. *United States*, 259 U. S. 75. See also *Mansfield* v. *New York Central R. R. Co.*, 102 N. Y. 205; *McMaster* v. *State*, 108 N. Y. 542; *Tobey* v. *Price*, 75 Ill. 645; *Merrimack Mfg. Co.* v. *Qunitard*, 107 Mass. 127; *Garfield &c. Co.* v. *Fitchburg R. R.*, 166 Mass. 119.

The principle is of special application to a war contract, where refusal to continue would have resulted in confusion in the Government's plans. The rule of law should conform to the obligation of patriotism.

The provision of the contract authorizing changes in the drawings or specifications does not include a failure to furnish specifications. The changes permitted under any such provision are changes of detail which do not essentially alter the nature of the article to be furnished. Such changes would not interfere with the general processes of production and would not operate as a complete suspension of the work. Failure to furnish specifications suspends progress to the total extent of their absence. Besides, the provision for changes apparently relied upon by the court below was in an earlier contract, and whether it was imported into this one is open to question.

The loss of the profit which the contractor would have made before the date of termination is the measure of damages for the delay which caused the loss. It is not here claimed as a loss due to the termination of the contract, but as a loss due to the delay which prevented completion before termination. It is claimed under the definition of actual damages stated in *Philadelphia, W. &*

B. R. R. Co. v. *Howard*, 13 How. 307. *St. Louis Beef Co.* v. *Casualty Co.*, 201 U. S. 173; *United States* v. *Behan*, 110 U. S. 338; *United States* v. *Speed*, 8 Wall. 77; *Roehm* v. *Horst*, 178 U. S. 1.

The plaintiff is entitled to recover the interest paid to the Government on the loans it made the plaintiff, because, by delaying the specifications, it prevented complete deliveries and payment to the contractor of cost and profit, from which the borrowed money would have been paid. This comes clearly within the rule of damages stated in the cases already cited. *Hattiesburg Lumber Co.* v. *Herrick*, 212 Fed. 834; *Bank of Columbia* v. *Hagner*, 1 Pet. 455; *Guerini Stone Co.* v. *Carlin Construction Co.*, 248 U. S. 334.

The payment of interest on a bank loan, made necessary by the same default, is no less a direct item of damage to the contractor than the payment of interest to the United States. The cost of revenue stamps on the notes, also claimed, follows the same principle.

The provisions of § 177, Jud. Code, forbidding judgment in the Court of Claims for interest upon a claim, have no application to this item.

When appellant undertook this contract, it had to discontinue its commercial business and suffered a loss in so doing. It was expected that this loss would be made good out of the fixed profit on the completed motors, as well as the uncertain profit on spare parts. The failure of the contractor to realize the entire profit and thus absorb the loss was due to the failure of the United States to furnish the specifications on time. That the loss still rests upon the contractor is therefore the fault of the United States and the contractor should be reimbursed therefor. See *Baird* v. *United States*, 5 Ct. Clms. 348; affd. 131 U. S. appendix cvi. If the contractor is allowed the amount of its profits as damages under the first item, this item is not allowable, as it is discharged by the profits.

The United States is entitled to credit upon it in the proportion which the profits actually received bear to the total profits which would have been received had the default of the United States not occurred.

Mr. Alfred A. Wheat, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck* was on the brief, for the United States.

MR. JUSTICE MCKENNA delivered the opinion of the Court.

Action in the Court of Claims against the United States for expenses in endeavoring to perform certain contracts with the United States made during the war with Germany, or for anticipated profits.

The contracts were for aeronautical equipment for war purposes. There were a first and primary contract and seven other contracts called supplemental agreements. The latter contained modifications of the first or primary contract, and each agreement contained modifications of those which preceded.

The first or primary contract, dated November 20, 1917, provided for 500 United States standard twelve-cylinder engines, sometimes referred to as Liberty engines. By an agreement dated December 11, 1917, the number was increased to 1,000. By another agreement dated January 4, 1918, the type of motor was changed and a motor called the Bugatti motor was substituted; and there were other agreements.

From this general statement it will be seen that the contract and agreements are determining elements in the claims sued upon. A full recital of them, however, would extend this opinion to an embarrassing length. We shall confine ourselves, therefore, to those which we regard of determining pertinence.

Upon demurrer of the United States, the Court of Claims decided the contractor entitled to no relief and dismissed its petition. This action is contested, and it is earnestly insisted that the contracts made time their essence and required speed and dispatch from the contractor, and demanded in their performance precedence upon all other work, involving necessarily, sacrifice and expense upon the part of the contractor. And time, it is contended, being of the essence of the contracts, this necessarily implied that the United States must have done everything to permit the contractor to comply with its obligations. The Government, however, was delinquent; and it is alleged that "the drawings and specifications referred to in the contract (Exhibit A) as being attached thereto (but which were not in fact so attached) were furnished piece-meal from time to time but not so as to enable the claimant to enter into quantity production; and the only work which was practicable under said contract was in making extensive alterations in the plant of claimant company to adapt it to the uses of the Government for the purpose of carrying out the contract (Exhibit A), to assemble a competent engineering staff, and to make other preparations for the performance of said contract, all of which the claimant did at great expense."

And further delinquency is charged in not performing the agreement which substituted the Bugatti motors, and Article I of the agreement is quoted as follows:

"That, subject to all the provisions of Article I in said contract No. 2318 contained, the Contractor shall make for the Government, instead of the articles described in Article I of said contract, two thousand (2,000) Bugatti motors, and such spare parts for said motors as the Government may order from time to time during the period of the construction of said motors, in accordance with specifications to follow."

The specifications were not furnished, it is said, until September 25, 1918; and that the delay was a breach of

the contract; and the contractor is entitled to recover for the losses caused thereby.

To this the Court of Claims answered that the contract contemplated a revision of the schedule (times of delivery) in regard to the engines. The provision to which that purpose was attributed is, that "in view of the present uncertain factors inherent in the articles, and in the establishment of the industry of producing them, it is understood that this schedule may require revision, . . ." The schedule designated June, 1918, as the month of complete production.

Changes were provided for in another article, and by still another it was provided that if in the opinion of the Chief Signal Officer of the United States the public interests so required, the Government might, upon thirty days' notice, terminate the contract. And there was provision for settlement of disputes.

Dates are important to be considered. The supplemental contract in which Article I appears, and which adopts Article I of the first contract, is dated January 4, 1918. Another agreement which was supplementary to that agreement was dated January 15, 1918, and still another dated February 11, 1918.

In none of these agreements, continuing as they did the obligations of the parties to them and the means of their performance, is there a word of complaint that the Government had been or was delinquent on account of not furnishing specifications or in any way. In the agreement of February 11, 1918, in Article II, it is provided that:

"In the interest of both parties hereto and in order to expedite the delivery of the said supplies, the Government will advance to the contractor under the Principal Agreement the sum of Four Hundred Thousand Dollars ($400,000) on the terms and security hereinafter mentioned, and will make payment directly to the contractor by check dated February 25, 1918."

There was another agreement, dated February 14, 1918, which continued in effect, except as modified, all that preceded. There was no protest or complaint of any kind, no accusation of default or delay on the part of the Government.

There was a seventh agreement, made September 26, 1918, and another, made October 23, 1918, for advance payments to the contractor.

The agreements are of significant strength. Their legal effect and that of the contract cannot be determined by any one provision but the totality of them must be regarded and their relations and purposes.

A war of magnitude was waging. The Government was eager for efficient instrumentalities and the contractor was enticed by the profit of their manufacture. The matters were urgent, but they were beset with contingencies. The Government could terminate the contract in the interest of the public welfare; and the war might cease. The latter did happen. However, before it happened and, before, it may be, there were signs of its happening, there were dealings and adjustments of preparation between the Government and the contractor. They took care of, and were intended to take care of, changing purposes, and no dissatisfaction was expressed. One of the changes was, as we have said, from the construction of 500 Liberty motors to 1,000, the completion and delivery of which was to be in June, 1918, and, as we have said, another change was the substitution of 2,000 Bugatti motors for the Liberty engines, and for such spare parts as the Government might order from time to time; the motors to be delivered by September, 1918. By the supplemental agreements which provided for those changes, it was also provided that their cost was to be paid by the Government, and the profit of the contractor was changed from $625 for each article to $750, and the Government agreed to advance the contractor $1,250,000, to be repaid with interest at 6%.

Upon this change to the Bugatti motors comes the first claim of the contractor, based upon Article I of the agreement of January 4, 1918, by which it was provided as follows: "That subject to all the provisions of Article I in said contract No. 2318 contained, the Contractor shall make for the Government, instead of the articles described in Article I of said contract, two thousand (2,000) Bugatti motors, and such spare parts for said motors as the Government may order from time to time during the period of the construction of said motors, *in accordance with specifications to follow.*" (Italics ours.)

No time is specified. It is, however, contended that necessarily a reasonable time must have been intended and was not observed. The specifications, it is alleged, did not follow until September 25, 1918, when the entire time for the production of the motors was within a few days of expiring, whereby it became impossible to produce any of the articles within the time limit of the contract.

It is not alleged, however, that the failure to furnish the specifications was willful on the part of the Government or fraudulent. On the contrary, it is alleged, that there was a belief upon the part of the government officers by whom and under whom the supplemental agreement was made that there were in existence complete specifications of the articles, which needed only to be obtained from France; that the motors had passed the experimental stage and were ready for production. It is, however, alleged that the statements in the contract operated as a representation to the contractor that such was the fact, and that production in quantity could begin at or shortly after the entry into the agreement. It is further alleged that, when the first motor was received shortly after the date of the agreement, it developed that extensive changes would be necessary, and the contractor was directed to proceed meanwhile actively with production

on the separate parts to the extent possible in view of the undeveloped character of the specifications of the engine. This was done in conjunction with the officers of the Government.

It will be observed that it is not alleged that the belief of the government officers was not consistently entertained nor that the contractor did not share it. Nor is it said that the work on the separate parts and the preparations for the performance of the contract did not engage the contractor's time. Indeed, the fact is that, by January 4, there were changes to the advantage of the contractor, and again by the agreement of February 11, 1918, and another as late as October 23, 1918, by which the Government agreed to advance to the contractor $1,250,000. And still no complaint. On the contrary there was acceptance of assistance.

It is manifest there were uncertainties on both sides and that, as they developed, preparations were necessary to meet them, and, in meeting them, the contractor did not regard the Government in any way delinquent. It was the abrupt and unexpected suspension of hostilities and the declaration of an armistice that was the cause of loss to the contractor, and the disappointment of profits from its contracts which it was preparing to realize and would have realized. But it took that chance and has not now a legal claim against the Government for reimbursement of its outlays. We need not distinguish between the outlays nor dwell upon them. They were outlays of the speculation, and subject to sacrifice and loss with its disappointment.

We have seen that counsel make much of the effect of the Government's urgency, and, it is contended, time in consequence became an essential of the contract. This, the contention is, influenced the contractor and necessarily determines the obligation of the Government. The Government was undoubtedly urgent, made so by its seri-

ous situation and tremendous responsibilities, but such was not the situation of the contractor. Time to perform its contract was all that was necessary to it, and but for the armistice it would have had time. If the armistice could have been foreseen, the relative situations might have been different. Expedition would not then have been exigent to the Government's purposes, but would then have been necessary to the contractor, if profits were to be realized from the production of the motors. There was no prophecy of the armistice—its sudden happening terminated the further execution of the contractor's undertaking, preventing, as we have said, the realization of profits. And, we repeat, this chance the contractor took and must abide the result.

Judgment affirmed.

DUESENBERG MOTORS CORPORATION *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 80. Argued October 19, 1922.—Decided November 13, 1922.

1. A contractor who incurred expense under a contract to manufacture articles for the Government for use in the late war, but whose opportunity to perform and earn the contemplated profits was cut short by the sudden cessation of hostilities, the declaration of the armistice and the consequent termination of the contract in accordance with its terms, took the chances of this contingency and cannot recover damages. P. 124.
2. *Held*, in this case, that delay of the Government in furnishing necessary specifications as contemplated by a contract for the manufacture of air-plane motors of a foreign model, due to an honest but mistaken belief, shared by the contractor, that the model was perfected and adequate specifications in existence, was not an actionable breach of representation, in view of the conduct and dealings of the parties for the expedition of the work, the absence of any protest over the delay and the absence of averment that it prevented the contractor from being fully occupied with preparatory and other work under the contract. P. 123.